No. 75-5841

In the Supreme Court of the United States

OCTOBER TERM, 1975

FEDERAL POWER COMMISSION, PETITIONER

v.

TRANSCONTINENTAL GAS PIPE LINE CORPORATION, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INDEX

CITATIONS

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The Solicitor General, on behalf of the Federal Power Commission, petitions for a writ of certiorari to review the order of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The order and memorandum of the court of appeals (App. A, *infra,* pp. 1A–8A) is not reported.

The initial order of the Federal Power Commission (App. E, *infra,* pp. 16A–43A) and its order granting rehearing in part and denying rehearing in part (App. F, *infra,* pp. 44A–65A) are not reported.

JURISDICTION

The order of the court of appeals (App. A, *infra,* pp. 1A–2A) was entered on August 1, 1975. A timely petition for rehearing was denied on August 28, 1975 (App. B, *infra,* pp. 9A–10A). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Although the order of the court of appeals is interlocutory, this Court has jurisdiction to review it by writ of certiorari. See *Forsyth* v. *Hammond,* 166 U.S. 506, 513, 514; *St. Louis, K.C.&C. R.R. Co.* v. *Wabash R.R. Co.,* 217 U.S. 247, 251. See also *United States* v. *General Motors Corp.,* 323 U.S. 373, 377; *Land* v. *Dollar,* 330 U.S. 731, 734, n. 2; *Larson* v. *Domestic and Foreign Commerce Corp.,* 337 U.S. 682, 685, n. 3.

QUESTIONS PRESENTED

1. Whether, when reviewing the formal adjudicative action of an administrative agency, a court of appeals has authority, if it believes that the administrative record is inadequate for effective judicial review, to order the agency to undertake an extensive factual investigation of a company subject to the agency's regulatory jurisdiction and to submit to the court a report of the results of that investigation.

2. Whether, if a court has such authority, it was properly exercised in the circumstances of this case.

STATUTES INVOLVED

Section 19(b) of the Natural Gas Act, 52 Stat. 831, as amended, 15 U.S.C. 717r(b), provides:

> Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there

is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28.

STATEMENT

1. This case arose out of an ongoing proceeding before the Federal Power Commission concerning the lawfulness of a proposed plan, filed in 1971 by respondent Transcontinental Gas Pipe Line Corporation (Transco), for the curtailment of natural gas deliveries to Transco's customers. After the Commis-

sion suspended the implementation of the proposed plan and directed that a hearing be held to determine its lawfulness, the parties to the proceeding negotiated an interim settlement agreement that included an emergency gas curtailment plan for the period of November 16, 1971, through November 15, 1972. The Commission conditionally approved the settlement agreement and deferred hearings on the permanent plan. (See App. E, *infra,* p. 17A.)

Transco then filed a new permanent plan, which the Commission suspended and set down for a hearing. The parties again entered into a proposed settlement agreement establishing an interim curtailment plan for the period of November 1972 to November 1973. The Commission again approved the settlement agreement and deferred hearings. (*Id.* at 18A.)

Transco thereafter sought to extend the interim plan for another year. The Commission rejected that request and directed Transco to file an appropriate permanent curtailment plan. Transco filed its plan in June 1973. The Commission suspended the plan but permitted it to be implemented as of November 16, 1973, pending the completion of hearings on its lawfulness. (*Id.* at 18A–19A.)

After petitions for review were filed, the court below, in November 1973, stayed implementation of the new permanent plan and directed that the 1972 interim plan remain in effect pending further order of the court. Nearly one year later, on the Commission's motion for clarification, the court, in October 1974, ordered that the curtailment plan for the 1974–1975

winter season must be either the existing interim plan (which had been in effect since November 1972) or any new interim plan that Transco might propose and the Commission might approve. (*Id.* at 19A–23A.)

2. On September 30, 1974, Transco filed a new proposed interim settlement agreement establishing a temporary curtailment plan for the period of November 1974 to November 1975. The agreement embodied both a plan for the allocation of natural gas supplies among Transco's customers and a monetary compensation scheme under which customers who receive more gas than the system-wide average would in effect compensate customers who receive less gas than the system-wide average (see *id.* at 25A–26A). By the terms of the proposal, the compensation scheme was not severable from the allocation plan (see App. F, *infra,* p. 54A).

The Commission found that the compensation feature of the newly-filed plan was "patently unlawful," in part because "it would require high priority jurisdictional customers to pay increased rates which are unrelated to the pipeline's cost of service plus reasonable rate of return" (App. E, *infra,* p. 28A).[1] The Commission accordingly denied Transco's motion for approval of the interim plan.

[1] The Commission recognized that the 1972 interim plan that it had approved contained a similar compensation scheme. It stated that what it regarded then "as nothing more than a billing arrangement" appeared on "[c]loser scrutiny" to "permit the interstate brokering of contractual entitlements without Commission approval" (App. E, *infra*, p. 30A).

The effect of that decision under the court's stay order was to leave in operation the 1972 interim plan, a result that the Commission found "would not be in the public interest" (*id.* at 31A).[2] Recognizing that "[t]he magnitude of the crisis on Transco's system" (*id.* at 23A) called for "prompt action" by the Commission (*id.* at 24A), but feeling disabled by the court's stay from taking the necessary emergency measures to impose a suitable curtailment plan, the Commission directed its Solicitor to seek a dissolution of the stay (*id.* at 34A).

At the same time, Transco sought an order from the court directing the Commission to allow implementation of the new interim plan pending review of the Commission's rejection of that plan. The court of appeals thereafter ordered that "our stay be modified to place the allocation scheme contained in the September 30, 1974, settlement agreement in effect pending further order of this court" (*Consolidated Edison Co.* v. *Federal Power Commission,* 511 F. 2d 372, 381).[3]

[2] The Commission expressed its "sense of frustration" with the constraints imposed by the court's stay, which forced upon the Commission "a Hobson's choice: Approve an unlawful plan, or disapprove it and allow the existing unlawful plan to continue in effect" (App. E, *infra*, p. 34A). In the absence of the stay, the Commission would have been free to exercise its "emergency authority to issue interim orders effecting a curtailment plan" (*Federal Power Commission* v. *Louisiana Power & Light Co.*, 406 U.S. 621, 644, n. 18).

[3] The court ordered that compensation payments under the plan be paid into an escrow account pending determination of the lawfulness of the compensation feature (511 F. 2d at 381). It also

The Commission subsequently denied applications for rehearing "insofar as they relate to the legality of the compensation scheme contained in the interim settlement plan" (App. F, *infra,* p. 60A).

3. Petitions for review of the Commission's order rejecting that plan were filed in the court of appeals and were consolidated by the court. The only issues presented by those petitions related to the validity of the plan's compensation scheme under the provisions of the Natural Gas Act.

After oral argument, the court, stating that it wished "to be more fully informed about the 'crisis' on the Transco system, before reviewing questions pertaining to its solution" (App. C, *infra,* p. 12A), issued an order *sua sponte* requesting that the parties submit certain information concerning the volume of Transco's natural gas reserves. The Commission and Transco filed timely responses to the court's inquiry.[4]

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stated that the Commission could fashion its own interim plan, if it considered that necessary to protect the public interest, and that any such "Commission action shall be certified forthwith to this court and shall be effective only upon order of this court modifying the stay announced in this opinion" (*id.* at 383).

On May 19, 1975, the court of appeals entered its final judgment on the petitions for review that were filed in November 1973 after the Commission ordered the implementation of Transco's permanent plan (see p. 5, *supra*). The court affirmed the Commission's order and "release[d] [its] grip on the interim curtailment arrangements." *Consolidated Edison Co.* v. *Federal Power Commission*, 512 F. 2d 1332, 1347. "In order to insure a smooth transition," however, the court "continue[d] the present stays in effect until such time as the Commission may move to dissolve them" (*ibid.*).

[4] The Commission's response was based on data supplied by Transco in reports regularly filed with the Commission. The response stated that "the Commission does not necessarily endorse

After receiving those responses, the court directed the parties to show cause why it should not order the Commission to conduct an immediate investigation of Transco's claim of reduced reserves (App. D, *infra,* pp. 14A–15A).

On August 1, 1975, the court issued the proposed order (App. A, *infra,* pp. 1A–2A), review of which is sought by this petition for a writ of certiorari. "Noting the refusal of the Federal Power Commission to certify to figures supplied by [Transco] purporting to support its claim of necessity for a severe curtailment of supply" (*id.* at 2A), the court ordered that its decision on the pending petitions for review would be held in abeyance "until the Commission has completed its own investigation and report to this court of Transco's claims of reduced reserves by immediate subpoena of Transco's books and records * * * and by field investigation has determined the extent of the reduced reserves and the bona fides of Transco and its suppliers in meeting their past and future contract commitments" (*ibid.*). The order directed "that said investigations and report to this court be made within 30 days" (*ibid.*).[5]

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the accuracy of the data supplied by Transco." It also stated that Transco's gas reserve and supply situation was currently the subject of two separate Commission investigations in other proceedings (see pp. 15–16, *infra*).

[5] In an accompanying memorandum, the court stated that, since "the Commission has long been on notice that substantial data are required to justify curtailment" (App. A, *infra*, p. 7A), "requiring that the Commission undertake the investigation ordered today, and complete the same within thirty days, is by no means so stark a command as that time limit viewed alone might suggest" (*id.* at 6A–7A).

Judge MacKinnon, in a separate opinion, stated that, while the extent of Transco's reserves and supplies is "not wholly irrele-

4. The Commission filed a petition for rehearing with suggestion for rehearing *en banc*,[6] in which it argued (1) that the information to be derived from the court-ordered investigation would not bear at all on the only issue before the court, the validity of the compensation feature of Transco's proposed plan,[7] (2) that, since a reviewing court is limited to an examination of the administrative record on which the agency based its decision, the information sought by the court, even if relevant, should be developed on the record before the Commission on remand, not by *ex parte* investigation and report to the court, and (3) that, as the Commission stated in its order directing the issuance of subpoenas, it would not be possible in any event for the Commission to complete the investigation within the time allowed.

The court denied rehearing on August 28, 1975 (App. B, *infra*, pp. 9A–10A).[8]

REASONS FOR GRANTING THE WRIT

1. This case presents an important question concerning the proper procedure to be followed when a reviewing court believes that the administrative record is inadequate for effective judicial review of agency action. The court of appeals' order requiring the Commission to undertake an extensive investigation and to submit a report on the results of that investigation exceeds the proper scope of its reviewing authority and represents an unwarranted and, we believe, unprecedented interference with the functional autonomy of an independent administrative agency.

Under Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b), a court of appeals reviewing a Federal Power Commission order has authority "to af-

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vant" to the court's reviewing responsibilities, "it is not our primary function in reviewing the instant plan to become involved in that complex factual inquiry" (*id.* at 8A). He stated that he "would reach the merits of the curtailment plan" and that "it would be more in keeping with the jurisdiction conferred upon us by Congress with respect to this matter to affirm the action of the Commission on the instant order and direct the Commission to determine the existence and extent of the gas shortage prior to passing on any subsequent curtailment plan" (*ibid.*).

[6] The Commission had, in the meantime, commenced efforts to comply with the court's order by directing the Secretary of the Commission to issue a subpoena *duces tecum* for the production of Transco's books and records (App. G, *infra*, pp.66A–68A). Moreover, the Commission issued an order modifying the investigatory method in an ongoing independent investigation into the cause of Transco's increased supply shortage (see pp. 15–16, *infra*) in order to expedite completion of that investigation.

[7] The Commission argued that, under the rationale of its orders under review, the compensation scheme would be illegal no matter how great or how small the supply shortage, so long as it was substantial enough to trigger the compensation scheme. It was undisputed that the shortage would be at least great enough to trigger some degree of compensation.

[8] The court of appeals thereafter denied the Commission's application for a stay pending the filing of a petition for a writ of certiorari, but it stayed the effectiveness of its denial until September 4, 1975, in order to allow the Commission to seek a stay from this Court. On September 4, 1975, the Chief Justice granted a stay pending further consideration of the Commission's application, and on September 8, 1975, he granted a stay pending further order of the Court. On October 6, 1975, this Court stayed the mandate of the court of appeals pending the timely filing of a petition for a writ of certiorari.

firm, modify, or set aside such order in whole or in part." "But that authority is not power to exercise an essentially administrative function" (*Federal Power Commission* v. *Idaho Power Co.,* 344 U.S. 17, 21).

The court's order in this case directing the Commission to undertake an investigation of Transco's natural gas supply and dictating both the investigatory method to be followed and the time within which to complete the study is an impermissible usurpation of a uniquely administrative function. It is for the agency, not the court, to determine how it shall discharge its regulatory responsibilities and allocate its resources, and the Natural Gas Act expressly commits to the Commission's discretion the determination of whether and by what means to conduct an investigation. Section 14(a) of the Act, 15 U.S.C. 717m(a), provides that "[t]he Commission *may* investigate any facts, conditions, practices, or matters which *it* may find necessary or proper" (emphasis added).

The court's order thus represents an unjustifiable departure from the proper role of a reviewing court. "For reviewing courts to substitute * * * their discretion for that of the [agency] is incompatible with the orderly function of the process of judicial review. Such action would not vindicate, but would deprecate the administrative process for it would 'propel the court into the domain which Congress has set aside exclusively for the administrative agency.'" *National Labor Relations Board* v. *Metropolitan Life Insurance Co.,* 380 U.S. 438, 444, quoting from *Securities & Exchange Commission* v. *Chenery Corp.,* 332 U.S. 194, 196.

Moreover, in reviewing an agency decision made upon a formal record, the court must limit its review to an examination of the administrative record; it may not properly base its review upon evidentiary materials that were not considered in the first instance by the agency. See *National Broadcasting Co.* v. *United States,* 319 U.S. 190, 227. "[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court" (*Camp* v. *Pitts,* 411 U.S. 138, 142). The order that we challenge here requires the Commission to submit to the court evidentiary materials that were not part of the administrative record, were not considered by the Commission, and may not properly be considered by the court.

That is not to say that the court is without recourse if it believes that the administrative record is inadequate for effective judicial review. If the court concludes that a material finding by the Commission is not supported by substantial evidence in the administrative record, it may set aside the order and remand the case to the agency. Moreover, if the agency "failed to make adequate provision for a record that could be subjected to judicial scrutiny," it may be appropriate for the court to "stay its own proceedings pending some further action before the agency involved" (*United States* v. *Carlo Bianchi & Co., Inc.,* 373 U.S. 709, 718).

Indeed, Section 19(b) of the Natural Gas Act provides that, if a party applies to the court for leave

to adduce additional evidence that would be material to the issues presented in the petition for review, "the court may order such additional evidence to be taken before the Commission * * *." It also provides, however, in keeping with the usual course of judicial review, that in such a case "[t]he Commission may modify its findings as to the facts by reason of the additional evidence so taken" and that any "modified or new findings, * * * if supported by substantial evidence, shall be conclusive * * *."

Nothing in the Act authorizes the reviewing court to require, instead, the submission of additional evidentiary materials directly to it.

2. The circumstances of this case do not, in any event, support the court's unorthodox demand for additional information.

First, the extent of Transco's supply shortage is not material to the issues presented by the petitions for review pending before the court of appeals. Those issues relate exclusively to the lawfulness of the compensation scheme that the Commission found invalid. The Commission's analysis of the compensation scheme did not depend at all on findings concerning the extent of Transco's reduced reserves,[9] and no party in the court of appeals suggested that the extent of Transco's supply shortages would bear on the legal issues presented to that court. Under the Commission's rationale for rejecting the proposed

[9] The Commission's discussion of Transco's shortages related only to the need for prompt action to implement a lawful plan. It was not a basis for disapproving the compensation feature of the submitted plan (see p. 7, *supra*).

plan, the compensation feature would be unlawful regardless of the extent of Transco's curtailment (see note 7, *supra*).

Even under the procedure prescribed by Section 19(b) for the adducing of additional evidence in a hearing before the Commission, there must be a showing that the additional evidence would be "material." There has been no such showing by any party to this proceeding, and the court's order and memorandum do not reveal in what respects the additional information would affect the proper disposition of the pending petitions for review. If the Commission had *approved* the interim plan upon a finding that Transco faced a severe supply shortage, and if the record failed adequately to support that finding, we could understand the basis of the court's concern. But here the Commission *disapproved* the plan on a ground wholly unrelated to the extent of a supply shortage.

Second, the inappropriateness of the court's order is underscored by the pendency of two independent investigations in other proceedings before the Commission. In January 1975, the Commission, noting that recent filings by Transco "indicate a system-wide curtailment far in excess of the amount projected" only a short time earlier, initiated a formal investigation under Section 14 of the Act into "the circumstances for the increased curtailment, on the system of Transco and a determination as to the current projections of curtailment for said system" (Order Instituting Investigation, Dkt. No. RP75–51,

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issued January 8, 1975, pp. 1, 3).[10] In February 1975, the Commission initiated a concurrent formal investigation requiring certain producer and pipeline respondents, including Transco, "to show cause why certain natural gas reservoirs in the Federal Domain are presently in nonproducing status and could not or should not be produced" (Order Instituting Investigation, Dkt. No. RI75–112, issued February 20, 1975, p. 1).

Thus, the Commission was already conducting wide-ranging investigations into the very matters that apparently concerned the court of appeals. The effect of the court's order would be to dictate to the Commission the investigative procedure to be followed and the manner in which to allocate Commission resources in order to satisfy the court's, rather than the Commission's, investigative priorities. We submit that it is inappropriate for a court thus to inject itself

[10] The Commission subsequently expanded the investigation to "encompass all facts bearing upon the alleged need for any curtailment by Transco to its customers and also to Transco's efforts to improve deliverability upon its system consistent with its obligations to provide adequate and reliable service to its customers" (Order Amending Prior Order and Broadening Scope of Investigation, Dkt. No. RP75–51, issued July 1, 1975, p. 1). After the court of appeals issued the order of which we seek review in this petition, the Commission, recognizing that "a thorough review of each and every producer selling to Transco would require the efforts of a very large staff over an extensive period of time, precluding the utilization of staff for other matters of equal priorities," modified the investigative procedure to focus on the 19 producers that furnish 80 percent of Transco's gas supply, thereby facilitating completion of the investigation "prior to the beginning of the coming heating season" (Order Amending Order and Requiring Report, Dkt. No. RP75–51, issued August 8, 1975, p. 2).

into the conduct of ongoing investigative proceedings before an independent agency.

Third, the court directed that the investigation required by its order be completed and that a report be submitted within 30 days. The Commission's subsequent order directing the issuance of subpoenas stated that, "even with the immediate compliance with the Court's order here initiated, in our judgment the investigation as detailed by the Court cannot be finished within the thirty day completion deadline set in the Court's order" (App. G, *infra,* p. 67A). The Commission's inability to complete the court's extensive investigation within the 30-day period was made known to the court in the Commission's petition for rehearing. But for the stay granted by this Court, the Commission would have found itself in violation of the court's order.

A reviewing court is not in a position adequately to appreciate the limitations of an agency's available resources. To insist upon compliance with an order (requiring a substantial commitment of those resources) by a date that the agency reasonably has stated it cannot meet is an improvident assertion of judicial power.

3. Although the court's order is interlocutory, its effect is immediate and irreparable. Unless the order is reviewed at this stage, the Commission will be constrained to conduct the investigation improperly ordered by the court. Even if the deadline for completing that investigation were extended to permit the Commission to comply with the order, it would require the diversion of substantial resources pres-

ently allocated to other Commission projects. If, after completion of the investigation and submission of a report, the Court were to determine, as we have argued, that the information is immaterial to the issues before it, and if it therefore affirmed the Commission's order, review of the present order would be effectively foreclosed.

In these circumstances, review by this Court at the present stage of the proceeding is appropriate.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 1975.

APPENDIX A

United States Court of Appeals for the District of Columbia Circuit

SEPTEMBER TERM, 1974

[Filed August 1, 1975]

No. 74–2036

TRANSCONTINENTAL GAS PIPE LINE CORPORATION,

PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

PIEDMONT NATURAL GAS CO., INC., ET AL.,

INTERVENORS,

AND CONSOLIDATED CASES

Before: BAZELON, *Chief Judge*; MACKINNON, *Circuit Judge* and EDWARDS,[1] *United States Circuit Judge for the United States Court of Appeals for the Sixth Circuit.*

ORDER

On receipt and consideration of the briefs and record in the above-styled case; and upon consideration

[1] Sitting by designation pursuant to Title 28 U.S.C. § 291(a).

of the replies of the parties to this court's order of May 28, 1975, and to the order to show cause of this court entered on June 17, 1975;

Noting the refusal of the Federal Power Commission to certify to figures supplied by Transcontinental Gas Pipe Line Corporation purporting to support its claim of necessity for a severe curtailment of supply with consequent economic and financial hardship to many thousands of industrial, commercial and house heating customers on the Eastern Seaboard;

Now, therefore, this court will hold in abeyance any decision upon the order of the Federal Power Commission concerning Transco's plan for allocating the allegedly scarce gas supply until the Commission has completed its own investigation and report to this court of Transco's claims of reduced reserves by immediate subpoena of Transco's books and records pertaining to all gas supplies in which it has any legal interest, whether by ownership, lease, contract or other means and by field investigation has determined the extent of the reduced reserves and the bona fides of Transco and its suppliers in meeting their past and future contract commitments;

Aud further, recognizing that time is of the essence, and for the reasons stated in the attached memorandum opinion, that said investigations and report to this court be made within 30 days from the effective date of this order.

Per Curiam.

HUGH E. KLINE, *Clerk.*

MEMORANDUM

It was in April of 1971 that the Federal Power Commission promulgated Order No. 431, 36 Fed. Reg. 7505, which required pipelines within FPC jurisdic-

tion to indicate whether an inadequate supply of natural gas would require curtailment of deliveries to customers. *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621, 623. In early cases, it was argued that FPC authority to accept curtailment plans arose from Section 7(b) of the Natural Gas Act, 15 U.S.C. §717f(b), the provision respecting abandonments in whole or part of facilities or service within FPC jurisdiction. That provision denies to a jurisdictional company the power to abandon such facility or service unless and until there is a finding by the Commission, that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment." Decisions of the Supreme Court and this Court have held (without holding that Section 7(b) is inapplicable under all circumstances) that the curtailment power of the FPC is embraced within the Commission's transportation jurisdiction, as implemented by Section 4 of the Act. *Michigan Power Co.* v. *FPC*, 161 U.S. App. D.C. 221, 494 F. 2d 1140 (D.C. Cir. 1974); *FPC* v. *Louisiana Power & Light Co., supra.*

The substantive standard governing FPC evaluation of curtailment plans is found in §4 (b) of the Act:

> No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service. 15 U.S.C. §717c(b)

As indicated above, the FPC processes curtailment plans under §4, including subsection (b) quoted above and subsections (d) and (e).

In *Louisiana Power & Light,* the Supreme Court found a "pattern of temporary and chronic natural gas shortages throughout the Nation," and supplier inability "to meet all of its contract commitments during peak demand periods." 406 U.S. at 626. In part, the Supreme Court relied for its finding of shortage upon the FPC's own Staff Report No. 2, National Gas Supply and Demand 1971–1990 (1972). That case, which defined the breadth of FPC curtailment power, said, "In the present cause, the issue is whether the FPC, acting under the head of its transportation jurisdiction and its broad mandate under §16, may order pipelines facing shortages to develop and submit rational curtailment arrangements." After distinguishing *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.,* 350 U.S. 332 (1956), which held that a pipeline may not unilaterally alter its contractual arrangements, the Court stated, "we conclude therefore that the FPC has the jurisdiction asserted here and that the Natural Gas Act fully authorizes the method chosen by the FPC for its exercise."

The *Louisiana Power & Light* case upholds [*sic*] the proposition that the FPC may require curtailment plans of pipelines "facing shortages," and there can be no doubt that actual shortage both underlies the concept of curtailment and justifies its application.

In light of that proposition, we have before us five challenging facts. First, in this case, Transco reported the highest proven reserves of gas in its history in 1969, yet less than five years later was reporting a shortage as severe that it required curtailments of 43.22 percent in this coming winter heating season, and

53.13 percent next summer. Response of Petitioner Elizabethtown Gas Company To Court's Order to Show Cause at 2. Second, the FPC "does not necessarily endorse the accuracy of the data supplied by Tranco," [*sic*] has not confirmed the existence of the claimed shortage, and is not now proceeding to do so for the purpose of this case, despite the Commission's approval of previous curtailment plans.[1] Response of FPC to Order Of May 29, 1975 at 2. Third, the FPC has informed this Court that the House Subcommittee on Oversight and Investigations of the Committee on Interstate and Foreign Commerce "has referred certain matters to the Justice Department for possible criminal prosecution," possibly for perjury charges concerning the extent of natural gas reserves. Further, Subcommittee Chairman, John E. Moss, "has specifically requested the Commission and its staff to refrain from contacting Mitchell Energy and Development Corporation and Cities Service Oil Corporation pending the present series of Subcommittee hearings on June 26 * * * and pending * * * [the Commission's] coordination with the Justice Department." Letter From John E. Moss to Hon. John N. Nassikas, June 19, 1975. Fourth, Transco's response to our show cause order states, "Because of claims of confidentiality of certain data supplied by independent producers, some of the underlying information may not be available on a public basis without obtaining a release from the producers (not from Transco). However, such data is regularly shown to FPC staff members for their review and analysis."

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[1] We note that the Commission, by Order Amending Prior Order and Broadening Scope of Investigation, issued July 1, 1975, has expanded their investigation in Docket No. PR 75–51 [*sic*, RP 75–51]. However, we do not believe that that proceeding meets the requirements of the instant litigation.

We think this comment tends to indicate reluctance on the part of Transco to disclose the extent of committed contractual entitlements which it holds, and from which it committed itself to supply Eastern Seaboard ultimate customers. Fifth, Chairman Moss has advised the FPC Chairman that it is his view that the instant order of this Court "is not only justified but essential." Letter of John E. Moss to Hon. John N. Nassikas, June 25, 1975.

In a pending case, *United States Steel* v. *FPC*, —— U.S. App. D.C. ——, 510 F. 2d 689 (D.C. Cir., No. 74-2117, January 10, 1975), we denied a motion to stay the Commission's denial of emergency relief, saying, "Only an agency sufficiently aware of the overall state of natural gas supply and demand could *possibly* handle requests for emergency relief *seriatim*, and yet avoid the circumstances where relief grants, each with a *de minimus* impact upon competing customers, cumulate in outright suffering for all." Clearly, that statement postulates that actual shortage, and the Commission's detailed knowledge thereof, underlies any curtailment and emergency relief therefrom. Further, we deferred to this detailed knowledge of the Commisison, "since all these pieces of data are required to decide each request for emergency relief, and since in the absence of detailed information our decision would have to be based upon speculation of the rankest sort, chaos would likely result." We believe now as then, and our order of January 10th was clear notice to the agency if notice it had not had before, that a solid base of data is absolutely essential for just determination of curtailments and relief therefrom.

Thus, requiring that the Commission undertake the investigation ordered today, and complete the same

within thirty days, is by no means so stark a command as that time limit viewed alone might suggest. Indeed, in light of the record in this case and the abundant notice given to the agency in the past, we would think the Commission highly remiss in its duties had it not begun that undertaking long before today's order. Certainly, a responsible administrator would have attempte [*sic*] to determine whether a shortage requiring curtailment presently exists, at least since attention was called to the matter by the people's representatives in Congress. To summarize, Order No. 431, respecting the filing of curtailment plans predicated upon actual shortage was promulgated more than four years ago. Order No. 467, setting forth general policy respecting curtailment based upon "end-use" and establishing categories with respect thereto, has been in force since January 8, 1973. Surely the Commission has long been on notice that substantial data are required to justify curtailment, which is, after all, the denial of an amount of gas otherwise contracted for. As we said in *Pacific Gas & Electric Co.* v. *FPC*, —— U.S. App. D.C. ——, 506 F. 2d 33, 35 (D.C. Cir. 1974); "The country appears to be experiencing a natural gas *shortage which necessitates* the curtailment of supplies to certain customers during peak demand periods." (emphasis added) (footnote omitted). The only rationale advanced in support of any curtailment plan is actual shortage of natural gas to the pipeline, and that fact remains to be established by the investigation today ordered.

MacKinnon, *Circuit Judge:* The curtailment plan we consider here is the result of a settlement among the parties based on an alleged shortage of natural gas. If the shortage is not as severe as we have been

led to believe, then the parties to the settlement may also have been misled, and may have reached their agreement based on misinformation. The fairness of the terms of the settlement is one factor in the Federal Power Commission's determination whether to approve the proposed curtailment plan, and thus necessarily a consideration in our review of the Commission's action. While the existence of an actual shortage is peripheral to our obligation to pass on the legality of the curtailment plan, it is not wholly irrelevant.

Nevertheless it is not our primary function in reviewing the instant plan to become involved in that complex factual inquiry. Since other bodies are investigating the extent of Transco's shortage, with more direct authority than ours, I would reach the merits of the curtailment plan we are asked to consider. It seems misdirected to me to imply neglect by the Commission when it has acted promptly to disapprove the proposed plan. Our failure to review the agency's decision and to pass on the merits of the challenged compensation feature will only delay our judgment on an aspect of Transco's curtailment plan to which all parties concerned seem dedicated.

Thus, while I am not opposed to verification of the existence and extent of the alleged shortage, I believe that it would be more in keeping with the jurisdiction conferred upon us by Congress with respect to this matter to affirm the action of the Commission on the instant order and direct the Commission to determine the existence and extent of the gas shortage prior to passing on any subsequent curtailment plan.

APPENDIX B

United States Court of Appeals for the District of Columbia Circuit

SEPTEMBER TERM, 1974

[Filed August 28, 1975]

No. 74–2036

TRANSCONTINENTAL GAS PIPE LINE CORPORATION,

PETITIONERS

v.

FEDERAL POWER COMMISSION, RESPONDENT, AND

CONSOLIDATED CASES

Before: BAZELON, *Chief Judge*; EDWARDS,[1] *U.S. Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit* and MACKINNON, *Circuit Judge*.

ORDER

On consideration of respondent's petition for rehearing and of the responses filed with respect thereto, it is

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[1] Sitting by designation pursuant to Title 28 United States Code, Section 291(a).

ORDERED by the Court that respondent's aforesaid petition is denied.

Per Curiam.

For the Court:

HUGH E. KLINE,
Clerk.

ROBERT A. BONNER,
Chief Deputy Clerk.

Circuit Judge MACKINNON would grant respondent's petition for rehearing.

HUGH E. KLINE, *Clerk.*

APPENDIX C

United States Court of Appeals for the District of Columbia Circuit

SEPTEMBER TERM, 1974

[Filed May 28, 1975]

No. 74–2036

TRANSCONTINENTAL GAS PIPE LINE CORPORATION, ET AL.

PETITIONERS

v.

FEDERAL POWER COMMISSION, RESPONDENT

PIEDMONT NATURAL GAS CO., INC.; FARMERS CHEMICAL ASSO., INC.; GAS SECTION; GEORGIA MUNICIPAL ASSO.; MANUFACTURES INSTITUTE, INC.; STAUFFER CHEMICAL CO.; OWENS-CORNING FIBERGLAS CORP.; PUBLIC SERVICE CO. OF NORTH CAROLINA; THE BROOKLYN UNION GAS CO.; LONG ISLAND LIGHTING CO.; CONSOLIDATED EDISON CO. OF NEW YORK, INC.; PHILADELPHIA GAS WORKS; ALUMINUM CO. OF AMERICA; SOUTH JERSEY GAS CO.; ATLANTA GAS LIGHT CO.; PUBLIC SERVICE ELECTRIC AND GAS CO., INTERVENORS, AND CONSOLIDATED CASES: 75–1038, 75–1045, 75–1077, 75–1099, 75–1103, 75–1200

Before: BAZELON, *Chief Judge*; EDWARDS,[1] *United States Circuit Judge for the Sixth Circuit* and MACKINNON, *Circuit Judge.*

ORDER

On review of an order of the Federal Power Commission entitled Order Finding Emergency on Transco's System and Denying Motion for Interim Settlement as to Curtailment Rules, issued November 12, 1974.

And noting that on page 8 of that order (Jt. App. 165) the Commission states as a predicate for prompt action:

> For those who have witnessed the steady decline in Transco's ability to meet system requirements, it can scarcely be denied that Transco's customers are faced with an emergency which threatens irreparable harm. In its most recent form 16, filed with the Commission on September 30, 1974, Transco projects that from September of 1974 through August of 1975, its firm requirements of 1,107,000,000 Mcf will be curtailed by 307,364,000 Mcf, or approximately 28 percent. For the winter period, extending from November of 1974 through March of 1975, Transco projects that its firm requirements of 509,834,000 Mcf will be curtailed by 100,784,000 Mcf, or approximately 20 percent.

And desiring to be more fully informed about the "crisis" on the Transco system, before reviewing questions pertaining to its solution, the court requests the parties to supply answers to the following questions:

[1] Sitting by designation pursuant to Title 28 U.S.C. § 291(a).

A. What were Transco's proven reserves represented to be:

(1) at the time of issuance of its original certificate of public convenience and necessity?

(2) at the point of greatest volume of such reserves?

(3) at the most recent report?

B. Starting with the year at which Transco's volume of proven reserves was greatest, state the volume of gas delivered by years down to the most recent year reported.

C. If subtracting the cumulative totals furnished under question B from the amount stated in answer to A(2) does not approximate the total furnished in answer to A(3) above, please furnish explanations in terms of:

(1) Newly opened and proven reserves;

(2) Revised estimates of proven reserves;

(3) Other.

The parties will have five days within which to comply with the Court's request.

Per Curiam.

For the Court:

HUGH E. KLINE,
Clerk.

By: ROBERT A. BONNER,
Chief Deputy Clerk.

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APPENDIX D

United States Court of Appeals for the District of Columbia Circuit

SEPTEMBER TERM, 1974

[Filed June 7, 1975]

No. 74-2036

TRANSCONTINENTAL GAS PIPE LINE CORPORATION, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

PIEDMONT NATURAL GAS CO., INC.; FARMERS CHEMICAL ASSO., INC.; GAS SECTION; GEORGIA MUNICIPAL ASSO.; MANUFACTURES INSTITUTE, INC.; STAUFFER CHEMICAL CO.; OWENS-CORNING FIBERGLAS CORP.; PUBLIC-SERVICE CO. OF NORTH CAROLINA; THE BROOKLYN UNION GAS CO.; LONG ISLAND LIGHTING CO.; CONSOLIDATED EDISON CO. OF NEW YORK, INC.; ALUMINUM CO. OF AMERICA; PHILADELPHIA GAS WORKS; ATLANTA GAS LIGHT CO., SOUTH JERSEY GAS CO.; CAROLINA PIPELINE CO.; PUBLIC SERVICE ELECTRIC & GAS CO.; SOUTH CAROLINA PUBLIC SERVICE COMM.; AND ENERGY MANAGEMENT OFFICE

Before: BAZELON, *Chief Judge,* MACKINNON, *Circuit Judge,* and EDWARDS,[1] *United States Circuit Judge for the Sixth Circuit.*

[1] Sitting by designation pursuant to Title 28 U.S.C. § 294(d).

ORDER

In light of the replies to this court's order of May 28, 1975, the parties will show cause within five days, if cause there be, why the following order should not issue:

> On receipt and consideration of the briefs and record in the above-styled case; and
>
> On consideration of the replies to this court's order of May 28, 1975; and
>
> Noting the refusal of the Federal Power Commission to certify to figures supplied by Transcontinental Gas Pipe Line Corporation purporting to support its claim of necessity for a severe curtailment of supply with consequent serious economic and financial consequences to many thousands of industrial, commercial and house heating customers on the Eastern Seaboard;
>
> Now, therefore, this court will hold in abeyance any decision upon the order of the Federal Power Commission concerning Transco's plan for allocating the allegedly scarce gas supply until the Commission has completed its own investigation of Transco's claims of reduced reserves by immediate subpoena of Transco's books and records pertaining to all gas supplies in which it has any legal interest, whether by ownership, lease, contract or other means and by field investigation has determined the extent of the reduced reserves and the bona fides of Transco and its suppliers in meeting their past and future contract commitments;
>
> And further, recognizing that time is of the essence in this matter, that said investigations and reports to this court be made within 20 days from the effective date of this order.

Per Curiam.

HUGH E. KLINE, *Clerk.*

APPENDIX E

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: John N. Nassikas, Chairman;
Albert B. Brooke, Jr., Rush Moody, Jr.,
William L. Springer, and Don S. Smith.

Transcontinental Gas Pipe Line)
Corporation) Docket No. RP72-99

ORDER FINDING AN EMERGENCY ON TRANSCO'S SYSTEM
AND DENYING MOTION FOR INTERIM SETTLEMENT
AS TO CURTAILMENT RULES

(Issued November 12, 1974)

On September 30, 1974, Transcontinental Gas Pipe Line Corporation (Transco) filed a motion requesting Commission approval of an interim settlement agreement setting forth a curtailment plan to be implemented on the Transco system for a one year period beginning on November 16, 1974, and terminating on November 15, 1975. Notice of this motion was issued on October 4, 1974, 39 Fed. Reg. 36923 (October 15, 1974), whereupon comments were filed by several of Transco's customers.

On the basis of the motion, the testimony attached thereto, and the comments filed thereon, we are compelled to deny Transco's motion. In our judgment, the proposed interim curtailment plan is unjust, unreasonable, discriminatory, and contrary to the public interest. The reasons for our decision will follow. Preliminarily, however, it may be helpful to review the extensive and complex background of this case.

I. Procedural Background

On May 17, 1971, in response to Commission Order No. 431, Transco filed a proposed permanent curtailment plan. By order dated May 27, 1971, we suspended the implementation of that plan for one day, and provided for a hearing to determine its lawfulness.

Subsequently, the parties to this proceeding negotiated their first interim settlement agreement which proposed an emergency gas curtailment plan to be followed from November 16, 1971, through November 15, 1972. One of the provisions of this agreement was as follows:

> Transco agrees that, on or before December 15, 1971, it will advise its customers, interested State Commissions, and the staff of this Commission of its long-term curtailment plans, and will submit revised tariff sheets setting forth such long-term curtailment rules. Additionally, Transco agrees that such new tariff sheets will be filed with this Commission no later than January 17, 1972, but will not be made effective prior to November 16, 1972. 1/

The proceedings involving Transco's May 17, 1971 filing were to terminate upon the filing of a permanent plan in accordance with the agreement.

Accepting the representations of the parties at face value, we issued an order on November 15, 1971, conditionally approving the settlement "without prejudice to any findings or order of the Commission i. any future proceeding involving Transco's * * * tariff provisions." 2/

1/ See p. 3 of Order Conditionally Approving Interim Settlement Agreement, issued November 15, 1971.

2/ Order Conditionally Approving Interim Settlement Agreement, issued November 15, 1971, p. 4.

On January 17, 1972, Transco filed a proposed permanent plan which was suspended and made the subject of hearings. Thereafter, however, the parties entered into a second interim curtailment plan to be followed from November 15, 1972, until November 15, 1973. Given the circumstances then prevailing on Transco's system, and in view of a commitment by Transco to file a permanent plan on or before May 1, 1973, we issued an order on November 15, 1972, approving the interim plan as just, reasonable, and in the public interest. 3/

Commitments notwithstanding, Transco did not file a permanent plan with the Commission on May 1, 1973; it filed, instead, a motion requesting that the interim plan be extended for yet another year. On May 23, 1973, we rejected this motion as failing to comply with Transco's agreement, and directed that an appropriate curtailment plan be filed on or before July 1, 1973. 4/ In that order, we advised Transco that it should "give consideration to Order 467-B," and, further, that any plan not in conformity with Order 467-B "may be found to be discriminatory or preferential, and Transco undoubtedly recognizes the risks * * *." 5/

On June 29, 1973, Transco submitted a proposed permanent plan which, with few exceptions, embodied the end use priorities of Order No. 467-B. Soon thereafter, however, on July 6, 1973, Transco submitted a renewal of its motion for a one-year extension of the interim plan.

3/ Order Approving Interim Settlement Agreement, issued November 15, 1972, p. 8.

4/ Order Denying Motion for One-Year Extension of Interim Curtailment Plan and Providing for Filing of Curtailment Plan, issued on May 23, 1973.

5/ Id. at p. 2.
Note: Order No. 467-B was affirmed in full in Pacific Gas and Electric Company v. F.P.C., ___ U.S.App.D.C. ___, ___ F.2d ___ (D.C. Cir. No. 73-1358, decided June 26, 1974).

On July 30, 1973, we issued an order which suspended Transco's proposed permanent plan and permitted its effectuation on November 16, 1973, pending the completion of hearings as to its lawfulness. 6/ We also denied reconsideration of Transco's request for a one year extension of the interim plan. As a result, several petitioners filed applications for rehearing alleging that Transco's proposed permanent plan was not voluntarily filed, but rather was the consequence of coercion by this agency. In our order of September 17, 1973, we emphatically denied these charges, and made it clear that--

> * * * our order in this proceeding neither ordered, directed, nor prescribed either directly or indirectly, any specific filing on the part of Transco. 7/

With reference to Order No. 467-B, we further stated that all pipelines remain free to file curtailment plans in whatever form they choose. 8/

II. Stay Orders Issued By The United States Court Of Appeals For The District Of Columbia Circuit

On September 18, 1973, Consolidated Edison Company of New York, a large Transco customer which uses much of its gas for low priority boiler fuel, filed a petition to review our orders, as well as a motion to stay those orders and continue the interim plan. Pursuant to this motion, and others subsequently filed, the D.C. Circuit, on November 9, 1973, issued an order staying the Commission's

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6/ Order Denying Motion for Reconsideration, Permitting Intervention, Fixing Date of Hearing, Specifying Procedures, and Suspending Proposed Revised Tariff Sheets, issued July 30, 1973.

7/ Order Denying Rehearing, issued September 17, 1973.

8/ Id. at p. 3.

orders until further order of the court. Since the effect of the Court's stay was unclear, the Commission thereafter filed a petition for rehearing and clarification. As a result, on December 14, 1973, the Court issued an order stating, inter alia:

> By our order of November 9, 1973, we stayed the effect of the respondent's order dated May 23, 1973, and respondent's order of July 30, 1973. We did not intend, however, to prevent respondent from holding hearings to consider a permanent plan for Transco.
>
> In our order of November 9, 1973, we stated that we wished to preserve the status quo. By this, we meant that we wished to continue in effect the situation as it existed on May 23, 1973, date of the first order which petitioners have requested us to review. Accordingly, Transco's then existing interim curtailment plan is to continue in effect until further order of this Court. Insofar as the respondent Commission's powers are concerned, they are no different than during the existence of the interim plan that we continued in effect by our order of November 9, 1973. (Emphasis added).

In the latter part of this summer, two of Transco's customers, Philadelphia Electric Company and Philadelphia Gas Works, filed motions with the Commission requesting that Transco be ordered to file a new interim plan, based upon the end use priorities of Order No. 467-B, to be followed for one year commencing with November 16, 1974. In these motions it was alleged that the currently effective pro rata plan would not be sufficient during the impending winter to protect high priority customers. Specifically, Philadelphia Electric alleged (Motion, p. 2):

> * * * [T]he interim pro-rata curtailment plan under which Transco is presently operating will no longer provide the protection to firm markets that it has in the past due to substantially increased curtailment levels. In all likelihood this plan will not afford protection to the high priority of service categories 1 and 2 [i.e., (1) residential, small commercial, and (2) large commercial, firm industrial requirements for plant protection, feedstock and process needs, and pipeline customer storage injection requirements]. 9/

Moreover, Philadelphia Electric complained (Motion, p. 3):

> * * * [T]he prospect of extensive curtailments of P.E. Co.'s firm industrial markets with attendant loss of jobs and productivity forbodes such serious consequences that P.E. Co. and its customers must be afforded a timely opportunity to take all prudent steps necessary to alleviate the impact of curtailments. Since other forms of energy are in short supply, including propane and low sulphur oil, an atmosphere of uncertainty regarding implementation of pipeline curtailment procedures is intolerable.
>
> P.E. Co. submits that the Commission has before it substantial evidence in the instant record upon which to issue an order that emergency steps are necessary to afford high priority categories, 1 and 2, protection from curtailment this coming winter. Furthermore, this evidence compels the issuance of an order requiring Transco to implement a 467-B end use curtailment plan for the forthcoming winter on an emergency interim basis.

9/ Bracketed material supplied on the basis of Order No. 467-B.

Notwithstanding these allegations, and notwithstanding any justification they might have on the basis of the record, we recognized our inability to provide any meaningful response as long as the Court's stay was effective. Rather than ignore these claims of impending harm, however, we filed a motion with the D.C. Circuit requesting that the Court permit the Commission to examine these complaints, examine the record, and "take any action which, on the basis of the evidence presently available, is necessary to assure just, reasonable, and nondiscriminatory curtailment on an interim basis for the forthcoming winter * * *." 10/

On October 4, 1974, the Court of Appeals granted the Commission's motion for clarification, but it explicitly refused to permit any action which, in the Commission's judgment, is required to protect the public interest. Specifically, the Court ordered:

> * * * Transco's interim curtailment plan which is in effect on May 23, 1973 and which has continued in effect since that time will remain in effect until the administrative proceedings regarding Transco's permanent plan have been completed and the Commission implements that plan.
>
> Our orders of November 9 and December 14 do not, however, prevent Transco from submitting a new interim plan to the Commission under §4 of the Natural Gas Act, nor do they affect the Commission's powers to implement such a plan or to suspend it pending hearings.
>
> Therefore, the curtailment plan in effect for the coming Winter will be either the interim plan currently in effect or such new interim plan as Transco may submit and the Commission may approve. The Commission's power to respond to petitions for emergency relief from the curtailment plan in effect are no different than they have always been under the curtailment plan which this order continues in effect. [Emphasis added]

10/ Motion of Federal Power Commission for Clarification, p. 14.

Thus, the Commission has been given two choices: (1) continue the past interim plan which is based upon a pro-rata reduction in contractual entitlements, or (2) approve in toto the proposed interim settlement plan which is based, in part, upon a pro rata reduction of contractual entitlements. If we find that neither plan is just and reasonable, that both will be discriminatory, or that both will cause irreparable harm, we are not free to take remedial action.

III. Current Emergency

For those who have witnessed the steady decline in Transco's ability to meet system requirements, it can scarcely be denied that Transco's customers are faced with an emergency which threatens irreparable harm. In its most recent Form 16, 11/ filed with the Commission on September 30, 1974, Transco projects that from September of 1974 through August of 1975, its firm requirements of 1,107,000,000 Mcf will be curtailed by 307,364,000 Mcf, or approximately 28%. For the winter period, extending from November of 1974 through March of 1975, Transco projects that its firm requirements of 509,834,000 Mcf will be curtailed by 100,784,000 Mcf, or approximately 20%.

The magnitude of the crisis on Transco's system is brought into even greater focus when one considers the petitions for extraordinary relief which have been filed. See, e.g. Petition of Stauffer Chemical Company for Interim and Permanent Extraordinary Relief from Curtailment Plan, filed on September 6, 1974, in Docket Nos. RP75-16-1 and RP75-17-1; Petition of Eastern Shore Natural Gas Company for Extraordinary Relief from Curtailment Plan, filed on October 10, 1974, in Docket Nos. RP75-16-1 and RP75-17-1; Petition of Farmers Chemical

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11/ Form 16 reports are filed with the Commission twice each year, pursuant to Order No. 489, 50 F.P.C. 561 (1973).

Association, Inc. for Temporary Extraordinary Relief, filed on October 16, 1974, in Docket No. RP75-16-2; Petition of South Jersey Gas Company for Extraordinary Relief from Curtailment Plan, filed on October 17, 1974, in Docket No. RP75-16-3; Petition of New Jersey Zinc Company for Extraordinary Relief from Curtailment, filed on November 5, 1974, in Docket No. RP75-16-4.

Thus, the need for prompt action by this Commission is manifest. As the Fifth Circuit has stated:

> * * * the Federal Power Commission has a statutory duty to the public under the Natural Gas Act to take effective interim curtailment action in the exigencies presented by gas shortages. 12/ [Emphasis added]

Interim curtailment regulation has been traditionally accomplished through the procedural devices of either Sections 4 or 5 of the Natural Gas Act. Under Section 4, the Commission may accept and suspend a company-filed plan, permitting its effectuation pending the completion of hearings. Under Section 5, the Commission may prescribe an interim plan for the company if, after hearings, it determines the existing plan to be unjust and unreasonable. The validity of both procedures has been sustained in full by the Supreme Court. F.P.C. v. Louisiana Power & Light Company, 406 U.S. 621, 643-647 (1973).

In the present case, however, our authority, as defined by the Supreme Court in LP&L, has been severely circumscribed by the D.C. Circuit. We have no power to permit the effectuation of Transco's permanent plan which was filed under Section 4 on June 29, 1973, and suspended by the Commission on July 30, 1973. Moreover, in view of

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12/ Atlanta Gas Light Co. v. F.P.C., 476 F.2d 142, 150 (5th Cir. 1973); See, also, F.P.C. v. Louisiana Power & Light Company, 406 U.S. 621 (1972).

the Court's stay, we have no power to prescribe an interim plan under Section 5, though the Supreme Court has said that "even when concluding a §5 hearing, the Commission would have emergency authority to issue interim orders effecting a curtailment plan. F.P.C. v. Natural Gas Pipeline Co., 315 U.S. 575 (1942)." 13/ Notwithstanding these limitations on our ability to act, however, we proceed with the findings which are required by the record.

IV. The Proposed Interim Plan

A. Analysis

The proposed interim settlement is, of course, a result of compromise by the customers participating in this proceeding. Those customers whose use of gas is relatively inferior, in terms of the public interest, obviously desire pro rata curtailment on the basis of contractual entitlements. In contrast, high priority customers would be more satisfied with the end use priorities of Order No. 467-B. To resolve the conflict, they have agreed to split the loaf. Specifically, the proposed interim plan assigns a seasonal or annual entitlement to each customer. These entitlements were determined on the basis of 50% pro rata curtailment and 50% curtailment under an Order No. 467-B end use plan, with certain adjustments for residential, commercial, and essential industrial requirements. 14/

13/ F.P.C. v. Louisiana Power & Light Company, supra at 644, n. 18.

14/ For example, consider a customer whose contract demand is 20,000 Mcf per day. On a day of 20% curtailment, that customer would be entitled to 16,000 Mcf under a pro-rata plan. During the same degree of curtailment under the Order 467-B end use plan, however, the customer may be entitled to less, which, for purposes of hypothesis, we shall assume to be 10,000 Mcf. Under the proposed interim plan, the customers' entitlement would be 13,000 Mcf which is the result of adding 50% of the pro rata entitlement (8000 Mcf) and 50% of the end use entitlement (5000 Mcf).

The heart of the proposed plan, however, is not in the curtailment procedure outlined in Article II of the settlement, but rather in the "Compensation for Curtailment" provisions of Article III. Under these provisions, those customers who suffer the most curtailment will receive compensation, while those curtailed least will provide that compensation. More specifically, Article III provides:

> * * * CD, ACQ and firm direct industrial customers being curtailed greater than the average curtailment of such customers shall receive credits to their bills from Transco of 50 cents per Mcf of such greater curtailment and the bills of customers in the same categories being curtailed less than the average curtailment of such customers shall be debited with an amount of 50 cents per Mcf of such lesser curtailment. In addition, it is agreed that at the end of the winter season, 25 cents shall be credited to the bills of customers for each Mcf which such customer had been curtailed greater than they would have been curtailed on the basis of 50% pro-rata and 50% Order No. 467-B end-use and 25 cents shall be debited to the bills of customers for each Mcf which such customers had been curtailed less than they would have been curtailed on the basis of 50% pro-rata and 50% Order No. 467-B end-use.

Insofar as the other material provisions of the proposed settlement are concerned, Article IV provides that the agreement shall terminate on November 16, 1975; Article V provides that extraordinary relief will not be sought by Transco's customers through the period ending November 15, 1975, except for certain unforseen circumstances; Article VI provides for dismissal of pending court cases, 15/

15/ Consolidated Edison Company of New York, Inc., et al. v. F.P.C., D.C. Cir. Nos. 73-1999 and 73-2017.

upon Commission approval of the settlement; Article VII provides that the interim settlement will not be challenged on environmental grounds; and Article VIII requires Transco to furnish its customers periodic curtailment reports.

B. Findings

If agreement among the majority of participating customers was the proper measure of the public interest, we would be constrained to approve the settlement now before us. However, our responsibilities under the Natural Gas Act require something more than the counting of votes. Indeed, as the Court of Appeals for the District of Columbia Circuit properly stated in Michigan Consolidated Gas Company v. F.P.C., 108 U.S.App.D.C. 409, 283 F.2d 204 (1960), certiorari denied, 364 U.S. 913 (1960):

> In viewing the public interest, the Commission's vision is not to be limited to horizons of the private parties to the proceeding (283 F.2d at 226). 16/

Viewed in this perspective, we cannot place our imprimatur upon the settlement. To the contrary, we are compelled to find that the proposed interim plan is unjust, unreasonable, discriminatory, and contrary to every element of the public interest.

16/ See, also, Scenic Hudson Preservation Conference v. F.P.C., 354 F.2d 608, 621 (2nd Cir. 1965), certiorari denied, sub nom. Consolidated Edison Co. of New York v. Scenic Hudson Preservation Conference, 384 U.S. 941 (1966). Cf. Pennsylvania Gas & Water Company v. F.P.C., ___ U.S.App.D.C. ___, 463 F.2d 1242 (1972); Greater Boston Television Corp. v. F.C.C., ___ U.S.App.D.C., 444 F.2d 841 (1970).

We believe that the proposed scheme of compensation, which is the cornerstone of the settlement, is patently unlawful and beyond our jurisdiction to either approve or enforce. In essence, it would require high priority jurisdictional customers to pay increased rates which are unrelated to the pipeline's cost of service plus reasonable rate of return. We have recently rejected a similar scheme in United Gas Pipe Line Company, Docket No. RP74-37-12 (order issued October 18, 1974), and what we said there applies equally well to this case (mimeo at 2-3):

> * * * [A] pipeline's jurisdictional rates, in order to be just and reasonable under Section 4(a) of the Natural Gas Act, 15 U.S.C. §717c(a), must be based upon the pipeline's cost of service plus a reasonable rate of return. If we required certain high priority jurisdictional customers to pay rates which included an increment to compensate other customers for their costs of alternate fuel, we would most certainly violate this standard, contrary to our Congressional mandate.

In addition to being unlawful because of its departure from the concept of cost-based pipeline rates, the proposed compensation scheme would foster undue discrimination in rates among similarly situated customers, contrary to Section 4(b) of the Act, 15 U.S.C. §717c(b). For example, consider a situation in which two customers in the same zone, Company A and Company B, have identical needs of 10,000 Mcf on a given day. Because of differences in contract, however, Company A's entitlement under the curtailment program is only 8,000 Mcf per day, whereas Company B's entitlement is 12,000 Mcf. Under the proposed compensation scheme, Transco would be permitted to deliver 10,000 Mcf to each customer on that given day, but Company A's rates could be increased by $1,500 that day (2000 Mcf x .75 per Mcf in excess of entitlement), whereas Company B's rates could be decreased by $1,500 that day (2000 Mcf x .75 per Mcf below entitlement).

Putting the discrimination issue aside, the proposed compensation plan also contemplates circumvention of the rate change requirements of Section 4(d) of the Act, 15 U.S.C. §717c(d):

> Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty days' notice to the Commission and to the parties.

With each brokering of a contract entitlement under the proposed plan, there would be a change in jurisdictional rates, i.e. one customer's rates would be increased, while another's would be decreased. To permit this without compliance with Section 4(b), would require a Congressional amendment. Episcopal Theological Seminary v. F.P.C., 269 F.2d 228 (D.C. Cir. 1959), certiorari denied, sub nom. Pan American Petroleum Corp. v. F.P.C., 361 U.S. 895 (1959).

Finally, we believe that implementation of the proposed compensation plan, if approved, would have serious, and obviously unforseen, jurisdictional repercussions upon Transco's customers. In our judgment, the interstate brokering of contractual entitlements is, in economic effect, a sale for resale of natural gas in interstate commerce. 17/ Accordingly, no customer could lawfully engage in such transaction without first obtaining a certificate of public convenience and necessity under Section 7(c) of the Act, 15 U.S.C. §717f(c). If such a certificate were sought, we would be required to examine all issues bearing upon the public interest, including the proposed rate of the sale.

17/ Cf. United Gas Improvement Co. v. Continental Oil Co., et al., 381 U.S. 392 (1965).

We must acknowledge that in our previous orders allowing the currently effective interim plan to operate through November 15, 1973, we approved a similar compensation scheme which provided that customers who are exempted from curtailment on a given day would be debited with a 25¢ surcharge per Mcf, whereas customers which are curtailed more than the announced level would be credited with 25¢ per Mcf. Viewed in the light of the circumstances existing at that time, we regarded the compensation feature as nothing more than a billing arrangement. Closer scrutiny, however, convinces us that it was something more; indeed, it was the harbinger of a full-scale program which would permit the interstate brokering of contractual entitlements without Commission approval. Whatever our judgments of the past may have been, we cannot now approve a scheme which promises (1) higher rates which are based upon the market value of contract entitlements, rather than the pipeline's cost of service plus a reasonable rate of return, (2) discriminatory rates among customers of the same class, (3) violation of the notice provisions of Section 4(e) of the Act, and (4) interstate sales for resale of natural gas without rate and certificate approval by this Commission.

Having thus concluded that the proposed interim settlement is unlawful, discriminatory, and contrary to the public interest, we are faced with the fact that the currently effective pro-rata curtailment plan will continue in effect during the impending winter, unless the courts intercede. This is unfortunate, indeed, as we will demonstrate.

V. The Currently Effective Interim Plan

A. Analysis

The currently effective interim plan, which has been continued by the D.C. Circuit beyond any period anticipated by Transco, is based upon contractual considerations, rather than end use. It provides, first, for the curtailment of

all of Transco's interruptible sales, and, second, for the curtailment of firm direct and major resale customers on a pro rata basis, but only to the extent that interruptible services of the resale customers are curtailed. Through an exemption procedure in winter, individual customers are entitled to have curtailment eliminated or reduced in order to protect firm customers. Finally, if firm service of customers cannot be met, priorities are established to permit further curtailment for the protection of human needs customers.

As noted above, the currently effective plan also has a compensation provision whereby customers who are exempted from curtailment on a given day are debited with a surcharge of 25¢ per Mcf, whereas customers which are curtailed more than the announced level of curtailment are credited with 25¢ per Mcf.

B. Findings

In our orders of May 23, 1973, July 30, 1973, and September 17, 1973, we essentially found that any further prolongation of the currently effective interim plan would not be in the public interest. We remain of that view.

To begin with, we believe that the legal impediments inherent in the compensation plan of the proposed settlement are also inherent in the compensation feature of the currently effective plan. Our rationale has been set forth above and need not be reiterated.

Secondly, we do not believe that it is in the public interest to continue interim curtailment on a pro rata basis for the fourth consecutive year. On more than one occasion, 18/

18/ See, e.g., United Gas Pipe Line Company, Docket Nos. RP71-29, et al., Opinion No. 647, 49 F.P.C. 179 (1973); Arkansas Louisiana Power and Light Company, Docket No. RP71-127, Opinion No. 643, 49 F.P.C. 53 (1973).

we have indicated that curtailment should be based upon end use considerations, in the absence of compelling evidence demonstrating that some other plan is just, reasonable, and nondiscriminatory. Moreover, the importance of end use in the promulgation of curtailment plans, has been consistently recognized by the courts. The Supreme Court has taken note of the need to protect "schools, hospitals, and homes completely dependent on a continued natural gas supply for heating and other domestic uses," 19/ and the D.C. Circuit has recently agreed that "end use is a most appropriate consideration for purposes of a curtailment plan." 20/

We do not say, of course, that an end use plan is the only type of plan which we will consider for Transco on a permanent basis; our decision on a permanent plan will be the one that is required after a full examination of the extensive record in this case. We do believe, however, that given the evils inherent in a pro rata plan which is based upon private contracts rather than public interest, curtailment on the basis of end use priorities affords the best interim protection for the consumers.

With the increased level of curtailment which is projected for the coming winter, it is clear that the currently effective interim plan will place firm service, including service to high priority customers, in jeopardy. This fact is not only borne out by the many petitions for relief currently pending before us, but it is candidly acknowledged by the sworn and unchallenged testimony of Transco's own witness, Mr. C. H. Mullendore, Jr., Vice President of Marketing:

19/ F.P.C. v. Louisiana Power & Light Co., 406 U.S. 621, 632 (1973).

20/ American Smelting and Refining Company v. F.P.C., ___ U.S.App.D.C. ___, 494 F.2d 925 (D.C. Cir. 1974), certiorari denied sub nom. Southern California Gas Co., et al. v. F.P.C., ___ U.S. ___ (October 14, 1974).

> * * * I am not able to give assurance that, at the projected deeper levels of curtailment on Transco's system, the present interim plan would operate beyond November 15, 1974 in a manner to accomplish its basic objective of protecting all firm loads. This is so because the plan depends upon actual market conditions and there is no built-in mechanism for guaranteeing that all interruptible loads will be in fact curtailed to protect the firm loads of the rest of the system.

For the reasons heretofore stated, we cannot lawfully approve the proposed interim settlement. There is, however, a plan which will alleviate Transco's concern, and that is the proposed plan which was filed by Transco on June 29, 1973, suspended by our order of July 30, 1973, and stayed subsequently by the D.C. Circuit. Unlike the currently effective interim plan, that plan does have a "built-in mechanism for guaranteeing that all interruptible loads will be in fact curtailed to protect the firm loads of the rest of the system." Specifically, the plan which was suspended by our order of July 30, 1973, requires that all large interruptible service, whether direct or indirect, be curtailed prior to any curtailment of firm service. Moreover, this plan embraces a system of end use priorities which are based upon public interest considerations rather than the vicissitudes of contract. Residential and small commercial customers are given the highest protection, regardless of the distributor's agreement with Transco. Furthermore, essential industrial uses, such as those for feedstock, plant protection, process needs, and pipeline customer storage injection, are afforded higher protection than other industrial uses. 21/

21/ We recognize that the plan suspended by our order of July 30, 1973, also contains a compensation scheme providing that customers which receive more than the system average shall pay 25¢ per Mcf for such over supply, while those receiving less shall obtain a credit of 25¢ per Mcf for such under supply. These provisions present no immediate problem, however, because they cannot be implemented without prior certificate and rate approval by this Commission. See discussion at pages 13-14.

Unfortunately, however, this plan cannot be implemented for the present winter because our suspension order permitting its effectuation as of November 16, 1973, has been stayed by the Court of Appeals. With the hope that this impediment can be alleviated, and that threatened irreparable harm for the impending winter can be avoided, we are directing our Solicitor to immediately seek a dissolution of the stay. We cannot overemphasize the importance of an expeditious decision on this matter. In our judgment, the interim plan to be followed for this winter--whatever its nature--must be placed into effect on or before November 30, 1974. Transco and its customers must be given sufficient time to prepare for the harsh months ahead. Moreover, a switch of curtailment plans during mid-winter will create operational chaos and exacerbate, rather than alleviate, irreparable harm.

In closing, we must confess to a sense of frustration which arises out of our duty to regulate Transco's curtailments, on the one hand, and our inability to regulate, on the other, as a result of the Court's stay. We are facing a winter in which nationwide curtailment will be 81% deeper than last winter. We are besieged with petitions alleging that pro rata curtailment during this winter will wreak irreparable harm upon high priority customers. We are burdened with petitions for extraordinary relief. We are told by Transco's own witness that the currently effective plan will not protect firm loads during the impending winter. As an alternative, we are not offered a fair and equitable curtailment plan, but a brokering scheme whereby customers with low contractual entitlements are at the mercy of those with higher entitlements. And when the wheel comes full circle, we have nothing but a Hobson's choice: Approve an unlawful plan, or disapprove it and allow the existing unlawful plan to continue in effect.

In defining the curtailment jurisdiction of this Commission, 22/ the Supreme Court has reaffirmed the wisdom of its earlier decision in F.P.C. v. Natural Gas Pipeline Co., 315 U.S. 575, 586 (1941):

22/ F.P.C. v. Louisiana Power & Light Co., 406 U.S. 621 (1972).

> Agencies * * * are free, within the ambit of their statutory authority, to make the pragmatic adjustments which may be called for by particular circumstances.

The circumstances of this case have been set forth above. It will suffice to say, at this juncture, that, unless our freedom to protect Transco's customers is restored, serious and irreparable harm will ensue.

The Commission finds; in addition to the foregoing; that:

(1) The proposed interim settlement agreement as to curtailment rules is unlawful, unjust, unreasonable, discriminatory and contrary to the public interest. Accordingly, it should be rejected.

(2) The currently effective interim curtailment plan, being implemented pursuant to orders of the United States Court of Appeals for the District of Columbia Circuit, will not adequately protect high priority service on the Transco system during the impending winter.

(3) High priority customers on the Transco system will be exposed to serious and irreparable harm during the impending winter unless the Commission is free to permit the effectuation of the end use plan suspended by its order of July 30, 1973, and to take such further action as the public interest may require.

The Commission orders:

Transco's motion for approval of an interim settlement agreement as to curtailment rules is denied.

By the Commission. Commissioner Springer, concurring, filed a separate statement appended hereto.

(S E A L)

Commissioner Brooke, dissenting, filed a separate statement appended hereto.

Kenneth F. Plumb,
Secretary.

Transcontinental Gas Pipe Line Corp.) Docket No. RP72-99

(Issued November 12, 1974)

SPRINGER, Commissioner, concurring:

I concur in the denial of approval for the interim settlement agreement, but do not agree necessarily with the finding that the end use plan suspended on July 30, 1973 is the only solution for the Transco system.

William L. Springer
Commissioner

Transcontinental Gas Pipe)
Line Corporation) Docket No. RP72-99

(Issued November 12, 1974)

BROOKE, Commissioner, dissenting:

I have grave fear that Commission rejection of the proposed Interim Settlement Agreement (ISA), which represents a singular accomplishment arrived at through reasonable compromise and with remarkable unanimity among numerous and disparate parties, could well presage a calamitous situation on the Transco system this winter.

It may well be, as Transco observed in its reply comments on the proposal, that the broad support or non-opposition of virtually all parties reflects a belief that the 50 per cent pro-rata and 50 per cent end-use plan "will permit them to survive during the coming year." Use of the word "survive" is appropriate because the self-interest thread of "survival" is woven throughout comments to the settlement.

The ISA, by adjusting varying positions, interests and issues, eliminates the daily uncertainty of the old pro rata plan; recognizes the Commission policy set forth in Order No. 467-B; continues to provide a high degree of planning certitude available under the old interim plan; embodies a gradual and reasonable shift, under present circumstances, to end-use curtailment; provides stability in its emergency relief moratorium (a provision now of arguable value), and assures distress compensation to severely curtailed distribution companies. The ISA would replace the present interim plan, to be effective from November 16, 1974, to November 15, 1975. It should be accepted by the Commission.

The proposal before us is a relatively simple document considering the gravity of Transco's system supply situation, which apparently has worsened since the ISA was filed with the Commission, but more comment on that later. Article II of the ISA states:

> "The general objective of the settlement curtailment procedures is to protect, within the limits of Transco's estimated available gas supply, natural gas service to essential high priority consumers while at the same time attempting to alleviate adverse economic, social and gas supply impacts on Transco's

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system resulting from projected curtailments. To this end, the agreed upon curtailment procedures provide for curtailment of Transco's share of the requirements of its larger firm customers initially on the basis of 50% pro-rata curtailment and 50% end-use curtailment in accordance with the Commission's Order No. 467-B set of priorities. However, certain exceptions have been made to this general method to provide, together with other available anticipated supplies, protection of service for residential and commercial requirements, storage injection requirements and essential firm industrial requirements. This latter category is defined as those industrial requirements dependent upon natural gas for feedstock, plant protection and process use which would not receive gas service from any source in the absence of the exception."

The agreement clearly indicates a movement by Transco and its customers away from the old pro-rata curtailment plan and toward the end-use format of Order No. 467-B (Order issued March 2, 1973). The diversity of the parties, each with various interests to protect, infers strong opposition to a straight 467-B program, and I deem it a mistake to ignore the recognition inherent in 467-B that reasonable and justifiable deviations would be permitted in curtailment programs.

Order No. 467-B commented (Page 3):

"We recognized that some flexibility is essential as curtailments first occur, in order to ameliorate the economic dislocations which necessarily ensue, and for that reason we made clear in Order 467 that the policy therein stated could, and would, be adjusted in appropriate cases where the hearing record so required."

The Commission later referred to "where deviation therefrom (Docket 469 policies) is required by the evidence." Order No. 467-B also acknowledged "general agreement" with the thesis "that a general rule is inappropriate and that each pipeline system should be treated on an individual basis." The Commission then stated a policy conclusion that end use, not contract entitlement, should be controlling. However, the policy should be applied reasonably and practicably.

In the more than 18 months since the end-use priorities of 467-B were enunciated, the nation's natural gas supply situation has worsened and curtailments have deepened.

Transco's supply shortfall has increased since the settlement was negotiated because on October 15, 1974, Transco customers were notified that the available gas supply during the 1974-75 settlement period would be about 20 Bcf less than the volumes used to compute the basic entitlements in Schedules 2 and 3 of the ISA.

It is apparent from comments that various parties regard this reduction in the volumes Transco estimated would be available for the 1974-75 settlement year as negating their obligation under Section V to refrain from filing petitions for extraordinary or emergency relief from the interim settlement. It was the intent of Article V that emergency relief would not be sought "except for changes in presently foreseen circumstance..." It is difficult to estimate how many relief petitions will be filed by accepting the settlement in the circumstances of this further erosion of Transco's supply, but rejection of the settlement, in my opinion, most assuredly will open the floodgates. The situation undoubtedly will be further exacerbated when the full impact of Commission rejection of the La Gloria Field settlement is measured, (Hilda B. Weinert and Jane W. Blumberg et al, Docket Nos. G-2730 et al, Order issued October __, 1974), an action to which I dissented.

Rejecting the ISA puts the Commission in the potential position of having to adjudicate a flood of petitions on an individual basis whereas its acceptance would have recognized that Transco and its customers were making deep concessions in order to treat supply shortages on a system-wide basis and to render some meaningful stability through the moratorium. As it is, treating individual petitions as a "rob Peter to pay Paul" proposition can only lead to unmanageable administrative procedures, encourage protective filings, compel lengthy and costly litigation, and result in discrimination and gross inequities.

I have often criticized the regulatory delay which comes from wrapping administrative law in the trappings of a true court of law. I do not believe it the purpose of regulation to merely sanction managerial decisions, nor do I believe the regulatory scheme requires us to ignore the reality that people most involved frequently know better how to run their businesses than the FPC. If the solution conforms to the public interest, and has record support, we are foolish to turn it down, especially when extreme sacrifice is being made, as in this case.

The Commission Staff Counsel's comments of October 18, 1974, correctly delineated the Commission's court-prescribed

options without reference to the possibility, although wholly improbable in my opinion, of a Commission-imposed plan based on the record within a reasonable time. I also concur in Staff's observation that the "Federal Power Commission regulates pipeline curtailments on a case-by-case basis and considers the supply-demand situation of each pipeline separately." (Staff Comments, Page 4) I would also agree that the Commission is without authority to expropriate the supplies of one pipeline to benefit another, but I disagree with its statement of October 15, 1974, regarding the insufficiency of the record to support the tendered settlement.

Pennsylvania Gas and Water Company and North Penn Gas Company observed in its statement of October 18 that "the evidentiary support for the settlement exists in plentitude in the evidentiary record already compiled in the proceeding," and emphasized that "the settlement agreement was not developed until after the close of the record and is based on facts and principles fully explored in the record." If 6,000 pages of testimony and more than 100 exhibits do not provide a complete record then a complete record is impossible of compilation!

In its comments of October 18, Staff detailed operation of the present plan, due to expire on November 15, 1974, and concluded that its continued operation would not be in the public interest. However, Staff did give the new proposal its tentative support, conditioned "upon the representation of the parties that the gas volumes allocated by the ISA will provide protection for residential, commercial and essential industrial markets." Because of Transco's downward supply revision, Staff now opposes the interim settlement agreement as unprotective of high priority customers and urges the Commission to formulate an interim curtailment procedure based on end-use priorities.

The proposed settlement constitutes clear recognition that the many complex issues to be adjudicated on their merits and supporting evidence could not be decided and a permanent curtailment plan determined prior to November 15, 1974. Thus, the parties turned to extensive negotiations to arrive at a further interim settlement which would, as equitably and as fairly as possible, allocate Transco's natural gas supply shortfall among all customers.

The State of North Carolina was particularly disturbed by the impact of any plan which required it "to bear a disproportionate share of what is clearly a national problem and will lead to unjustifiable discrimination against North

Carolina's citizens and industries." (North Carolina's Comments, October 18, 1974; Pages 1-2) North Carolina is entirely dependent on Transco for its natural gas supplies, which imposes a somewhat peculiar curtailment situation which the State regards as discriminatory unless (1) account is taken of those Transco customers also supplied by other pipelines with less curtailment, and (1) the Commission "direct(s) the transfer of gas, at an appropriate rate, from pipelines with a more favorable supply" to those in deep distress. I, of course, do not believe the Natural Gas Act gives the Commission this power of supply allocation. Although it will be cut 39 per cent below contract entitlement during the settlement period, North Carolina regards the proposal as not an "unreasonable short-term compromise" with which "we are willing to attempt to live..." (North Carolina Comments, Page 2). North Carolina's position is especially disturbing and probably will become untenable should the reduction in Transco's La Gloria volumes be significant. In that event, we can anticipate intolerably severe economic dislocation, affecting not only North Carolina, but all states stretching from South Carolina to New Jersey even under the proposed interim settlement agreement with its 50-50 allocation arrangement.

It is apparent from the responses that the present pro-rata plan has been equitable and fairly easy to implement in an effort to protect high-priority residential and commercial and other firm customers from curtailment, especially those wholly dependent on Transco. It is also equally evident that an Order No. 467-B curtailment would not be regarded as a Heaven-sent panacea. As a matter of fact, it probably would be bitterly opposed as being utterly disruptive. In view of this implication, I regard the 50-50 settlement proposal as a remarkable compromise which should be accepted as being in the public interest.

The potential impact of a 467-B plan, I conclude, probably formed the foundation for the compensation features in that end-use results in disproportionate curtailment among distributors with some having to absorb the economic losses attendant to loss of gas supply. It is a means to allocate the financial burden in the same manner curtailment allocates supply. Compensation payments are intended to further balance the equities, and is consistent with the principle of the 25-cent debit-credit surcharge accepted as Article IV, of the "order Approving Interim Settlement Agreement," issued November 15, 1972, and still in effect. Virtually,

all of Transco's customers, including those who will pay compensation, either support, or do not oppose, the payments provision as an essential ingredient of the compromise.

It would be premature to try to assess the full impact of Transco's deepened supply curtailments on the emergency relief moratorium provision, which makes a powerful contribution to the urgent need for stability and orderly management among all customers over the entire Transco system. While I regard the settlement as a good faith agreement requiring good faith compliance, I must concede the possibility that the moratorium provision may now be meaningless. If this assumption is correct, then it will be up to the Commission to view all petitions for emergency relief with more strictness than heretofore demonstrated.

In any event, the interim settlement agreement should be approved, pending prescription of a permanent curtailment plan for Transco. There is enough caution in the record before us to compel a searching look before imposing a flat 467-B program.

It appears that Transco is the victim of this Commission's inability to recognize a formula which can temporarily reallocate an inadequate supply of gas among customers with varying degrees of need equitably and without injury to individual rights of supply.

I am mindful that this is the 11th of November 1974 and that the history of this proceeding is long and tenuous. I am fearful of the consequences of continued litigation and I am aware of this Commission's demonstrated and legally frustrated inability to direct or encourage a harmonious agreement among Transco and its customers. This, in my opinion, is not the time for this Commission to say that it can't permit Transco either to continue its former interim settlement plan or to adopt its new settlement plan because both are illegal. We have been ordered by the Court of Appeals to do one or the other and it makes infinitely more sense to me to accede to the Court's alternative and accept at this time the new settlement agreement which is based on much more current data than the 3-year-old interim plan my colleagues would, in effect, have Transco resort to.

I am compelled to dissent to the decision reached by my colleagues. Unlike the reasons alleged for their decision I do not find that the opinion which they have reached is unlawful or discriminatory, but it is untimely, inappropriate and out of season.

Albert B. Brooke, Jr.
Commissioner

APPENDIX F

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: John N. Nassikas, Chairman;
Albert B. Brooke, Jr., Rush Moody, Jr.,
William L. Springer, and Don S. Smith.

	Docket Nos.
Transcontinental Gas Pipe Line Corporation	RP72-99
Transcontinental Gas Pipe Line Corporation (Eastern Shore Natural Gas Company)	RP75-16-1
Eastern Shore Natural Gas Company (Stauffer Chemical Company)	RP75-17-1
Transcontinental Gas Pipe Line Corporation (South Jersey Gas Company)	RP75-16-3
Transcontinental Gas Pipe Line Corporation (Union Gas Company - New Jersey Zinc)	RP75-16-4
Transcontinental Gas Pipe Line Corporation (City of Linden, Alabama, et al.)	RP75-16-5

ORDER
GRANTING REHEARING IN PART, DENYING
REHEARING IN PART, AND REQUIRING
ENVIRONMENTAL IMPACT STATEMENT

(Issued January 10, 1975)

We grant rehearing in part of our order of November 12, 1974, in Docket No. RP72-99.

As a result of a recent order of the Court of Appeals for the District of Columbia Circuit, the settlement agreement filed with us in that docket on September 30, 1974, by the Transcontinental Gas Pipe Line Corporation is now in effect, providing an interim curtailment plan for Transco based essentially on 50% pro rata curtailment and 50% end use considerations. The compensation plan that is part of the settlement agreement, and

about which we have expressed our misgivings, is also in effect, to the extent that the payments required pursuant to it are to be paid into an escrow account pending determination of the legality of the procedure. We shall speak further to these matters below, but will first place the rehearing applications now before us in context.

Background:

Our recital of the background of this proceeding can, for current purposes, commence with our order of November 12, 1974. The history of the case prior to that date is adequately summarized in that order. On November 12 a majority of the Commission concluded that an emergency exists on the Transco system, with a foreseen 20% curtailment of firm requirements during the 1974-75 winter season, and 28 % on an annual basis; that such curtailment levels threaten Transco's customers with irreparable harm; that the then-effective interim curtailment plan, being based on pro rata contract curtailment, is contrary to the public interest; and that Transco's settlement proposal of September 30, based on 50% pro rata contract curtailment and 50% end use curtailment, is unlawful and should be rejected. We further stated that the compensation scheme that is a part of the settlement plan is unlawful because it would depart from cost-based rates, it would foster undue discrimination, it would circumvent section 4(d) of the Natural Gas Act, and it would involve potential violations of section 7(c). Finally, we expressed our continuing preference for the end use curtailment plan filed by Transco on June 29, 1973, the effectiveness of which was stayed by the Court of Appeals.

Following our November 12 order,

--Transco, on November 13 tendered for filing with us an interim curtailment plan that parallels in almost all particulars the plan it had filed on June 29, 1973. It, too, is based on end-use priorities. We gave notice of the Transco action the following day, and we invited comments on it. In the next several days we received comments or protests from approximately two dozen sources, most of which urged rejection of this latest plan.

--Eighteen applications for rehearing of our November 12 order were filed between November 13 and December 12. 1/ Some of these applications undertook to rebut the reasoning that led to our conclusion that the compensation plan is unlawful; several presented arguments as to the undesirability of an interim plan based essentially on end-use priorities; and almost all contended, in effect, that we should have accepted the Transco settlement plan of September 30, 1974.

--The Court of Appeals for the District of Columbia, on November 26, in Consolidated Edision v. F.P.C., No. 73-1999, issued a further opinion concerning an interim curtailment plan for Transco. Following the filing of various motions by the petitioner, certain intervenors, and this Commission, the

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1/ Applications for rehearing of the November 12, 1974, order were filed by the General Motors Corporation and the Brick Institute of America, on November 13, 1974; the Consolidated Edison Company of New York, Inc., the Owens-Corning Fiberglass Corporation, and the Transcontinental Gas Pipe Line Corporation, on November 15, 1974; the City of Danville, Virginia, the City of New York, the Clinton Newberry Natural Gas Authority, the Elizabethtown Gas Company, the Long Island Lighting Company, the Piedmont Natural Gas Company, Inc., the Public Service Commission of the State of New York, and the Public Service Electric and Gas Company, on November 19, 1974; the Virginia Pipe Line Company on November 21, 1974; the Consolidated Gas Supply Corporation on November 25, 1974; and the Atlanta Gas Light Company on November 27, 1974. Our order of December 13, 1974, granted rehearing of the foregoing applications for purposes of further consideration. Applications for rehearing were filed on December 12, 1974, by the South Carolina Public Service Commission, the South Jersey Gas Company and the Eastern Shore Natural Gas Company, and the State of North Carolina and the North Carolina Utilities Commission. Our order of December 31, 1974, granted rehearing for purposes of further consideration to these December filings.

court in its opinion concluded that the then-effective pro rata curtailment plan should not be continued in effect and that the end use plan, filed in June of 1973 and again on November 13 of this year, was also inadequate and unacceptable. The court placed in effect "the allocation scheme contained in the September 30, 1974, settlement agreement", pending further order of the court. As to the compensation scheme, the court accepted the suggestion advanced by several parties that "the FPC's objections could be met by placing funds in an escrow account pending a determination of the procedure's legality'. The court also stated that

> Our present action in placing into operation the allocation plan contained in the settlement agreement in no way precludes the Commission from modifying the settlement plan or taking other action based on the information which it has generated and is peculiarly in a position to sift and evaluate.

And further, the court stated that the record compiled in this proceeding

> provides a valid basis on which the Commission, under the conditions which now confront Transco's customers, could issue interim orders effectuating a plan which does not comport with the one submitted by the pipeline.

But the court made clear that it would maintain continuing surveillance, and that any action by us would be effective only upon the court's approval.

From the foregoing quoted language, we understand that there has been restored to this Commission the authority vested in us by the Natural Gas Act, particularly our curtailment authority contained in sections 4 and 5, so that we may prescribe an interim curtailment plan for Transco or modify the settlement plan now in effect -- subject, of course, to such constraints as appear elsewhere in the court's opinion.

The Compensation Scheme:

We turn first to a further discussion of the compensation scheme. We remain of the view, expressed in our order of November 12, 1974, that it is unlawful.

The interim curtailment plan now in effect pursuant to the order of the Court of Appeals provides that those customers of Transco who are curtailed most heavily will receive compensation, and that such compensation will be paid by the Transco customers who are less heavily curtailed. More particularly, any Transco customer who is, under the settlement allocation plan, curtailed less than the system average, would pay a surcharge of 50 cents per Mcf for the gas he receives in excess of the system average. A customer who is curtailed more than the system average would, on the other hand, have credited to his bill 50 cents per Mcf for the gas he does not receive, up to the system average. Similarly, and in addition, a further 25 cents per Mcf surcharge is applied with respect to a customer who receives more gas than he would be entitled to under a cutailment plan based precisely on 50% pro rata contract curtailment and 50% end use curtailment under our Order No. 467-B. And, by the same token, a further 25 cents credit would be allowed in connection with those receiving less than they would be entitled to receive under a 50-50 plan. Accordingly, a Transco customer with a high priority load could pay, in addition to the base rate, a 75 cents per Mcf surcharge for some of the gas he receives from Transco, and other Transco customers who are more heavily curtailed would be credited at the rate of 75 per Mcf for gas forgone. Transco would act in effect as the transfer agent.

We recognize that this Transco compensation scheme is designed to respond to the phenomenon of heavy curtailments by providing a kind of rough justice. Those customers most heavily curtailed would receive compensatory payments that would, to varying extents, reduce their burdens. But the

justice that would thereby be provided is, we think, too rough. It is too rough to pass muster under the Natural Gas Act, and it is too rough for us to view as equitable.

Our November 12 order provides four bases for our conclusion that the Natural Gas Act does not permit this compensation scheme. Many parties dispute our conclusion and our reasoning -- almost all of those who have filed applications for rehearing do so, and in addition, the legal question is discussed in many of the initial briefs and reply briefs filed or November 1 and November 25, respectively, in connection with a permanent curtailment plan for Transco. We thus have before us extensive arguments by the parties on the lawfulness of this kind of compensation scheme. Some of the parties support our November 12 views on this subject; a greater number do not.

We said on November 12 that the compensation scheme is unlawful because "it would require high priority jurisdictional customers to pay increased rates which are unrelated to the pipeline's cost of service plus reasonable rate of return" (p. 13). We continue to think so. Many parties point out that we have often departed from the view that rates must be strictly cost-based, as, for example, in connection with our optional procedure for the establishment of producers' rates. But we are and have been unwilling to prescribe rates or customer classifications that are unrelated to cost, and that is what we would have to do if we were to approve the Transco compensation scheme. The affidavit of Transco's Vice-President that accompanied the filing of the interim settlement makes clear that the 50 cents and 25 cents payments do not derive from any effort to establish cost consequences. These figures were plucked from the air, and their sole support stems from the fact that the private parties to this proceeding were largely willing to embrace them. To discover such figures supported by so many, is not an inconsiderable achievement, but the achievement is not one that is countenanced by the Natural Gas Act. We have very recently been reminded by the Court of Appeals for the District of Columbia that "it is doubtful that non-cost factors can sustain a decision by the FPC which is unsupported by sound cost data". Consumers Union v. F.P.C., et al., No. 73-1972 et al., October 7, 1974. There is no

allegation by any party that the compensation here involved is based on any cost data, or on any support whatsoever as to price level. In its absence, we cannot approve the plan.

In a further argument concerning this point, the South Jersey Gas Company and the Eastern Shore Natural Gas Company contend that we should not be troubled by the absence of cost support here, because we have approved penalties for overruns "without any mathematical calculation as to their impact" (Initial Brief, p. 15). But we think the analogy is a false one. We have indeed approved rather stiff penalties for unauthorized overruns (United Gas Pipeline Company, Opinion No. 671, issued October 31, 1973; El Paso Natural Gas Company, Opinion No. 697, issued June 14, 1974), but we were in such cases dealing with just that: penalties for unauthorized overruns. In Transco's case, on the other hand, the additional charges are not intended to constitute penalties or deterrents (although we think they would have that effect), and they would apply to gas that the customer is fully authorized to take.

Our November 12 order also concluded that the compensation scheme is objectionable because it would foster undue discrimination. We illustrated this conclusion with a hypothetical case showing that two companies, similarly situated except for their contract entitlements, would, with the compensation scheme in effect, pay widely disparate rates for the same quantity of gas. To the several parties who argue that the case is oversimplified, we would point to the non-hypothetical case outlined in Philadelphia Gas Works' initial brief:

> ...under the settlement proposal, PGW [Philadelphia Gas Works] in effect would be paying a premium of over 6 cents per Mcf for all Transco CD gas it received during the coming winter period, while Piedmont Natural Gas Company would receive a discount of over 7 cents per Mcf for all such gas it received during this period. The latter case would result from Piedmont's receipt of 50 cents per Mcf compensation for the approximately 2,800,000 Mcf difference between the volume it would receive under a pro-rata curtailment... and the volumes it would receive under the settlement. In addition, Piedmont would receive 75 cents per Mcf

> for the some 200,000 Mcf less gas it would receive under the settlement than under the 50% pro-rata - 50% Order No. 467-B figures. The resulting payment of some $1,500,000 to Piedmont, applied to Piedmont's settlement entitlement of 20,140,000 Mcf, would reduce the rate, for Transco's deliveries to Piedmont, by over 7 cents per Mcf. In contrast, PGW would be forced to pay 50 cents per Mcf for the approximately 1,300,000 Mcf difference between pro-rata curtailment volumes and the 50% pro-rata - 50% Order No. 467-B levels. In addition, PGW would be compelled to pay 75 cents per Mcf for the some 800,000 Mcf difference between the 50% pro-rata - 50% Order No. 467-B level and the settlement level. The resulting $1,250,000 compensation liability, applied to PGW's settlement entitlement of approximately 20,000,000 Mcf, would increase PGW's cost of gas from Transco by over 6 cents per Mcf. Adjusting for zone differentials, Transco's rates would vary by 13 cents per Mcf for gas served to PGW and to Piedmont during the winter season. (p. 18)

To those who argue that the compensation scheme would work to eliminate discrimination, rather than to create it -- on the ground that the consumer customers of one distributor ought not to pay rates that differ substantially from those paid by the same kind of consumer customers of another distributor, and compensation payments would tend to have an equalizing effect on their rates -- our answer is two-fold. First, we are not empowered to fix rates for sales not subject to our jurisdiction, and such rates already differ greatly, depending upon a multitude of economic factors plus the varying views of State commissions. Additionally, the payments, unrelated to costs, losses, or hard data of any sort, are as certain to be hurtful to one group of consumers as they are to be helpful to another, without visible regard to the question of how much helpfulness is actually needed. Indeed, the justice would be too rough.

Thirdly, we stated that the compensation scheme would circumvent section 4(d) of the Natural Gas Act, which bars rate changes in the absence of notice to the Commission and to the public. We now abandon this objection, to the extent that we earlier applied it to Transco itself. If the compensatory

payments are suitably reflected in Transco's tariff filings, as we can presume (and we grant rehearing below with respect to our earlier rejection of Transco's tariff sheets), then this objection seems to us no longer well taken. That is to say, if Transco's filed tariffs were to comply with the requirements of Section 154.63 of our Regulations and display fully the circumstances in which the additional 50¢ and 25¢ charges were to apply, then the requirements of section 4(d) and the Regulations thereunder would be met by Transco. Transco would not be required to refile each time such additional charges are to be collected, or abandoned. We are prepared to analogize the rate changes automatically arising from compensation payments and credits to those automatically arising from, for example, fuel adjustment clauses. We accept the latter, and if otherwise unobjectionable, we would also accept the former, if set forth in the pipeline's tariff.

But we remain of the view that the compensation scheme would involve circumvention of section 4 by Transco's customers. As we shall explain below, we think those customers who participate in the compensation scheme, under which some forgo gas and others acquire additional supplies in return for compensatory credits and payments, are engaging in sales subject to our jurisdiction. Natural gas companies that make jurisdictional sales must file their rates with us under section 4(a) of the Natural Gas Act, and they must file changes under section 4(d). In the absence of suitable rate filings by those Transco customers who make such jurisdictional sales pursuant to the compensation plan, such customers would engage in violations of section 4.

Finally, we objected to the compensation plan because, without more, it would involve the violation of section 7(c) of the Natural Gas Act. We stated:

> In our judgment, the interstate brokering of contractual entitlements is, in economic effect, a sale for resale of natural gas in interstate commerce... Accordingly, no customer could lawfully engage in such transaction without first obtaining a certificate of public convenience and necessity under Section 7(c) of the Act... (p. 14)

We are now on uncharted ground and dogmatism is inappropriate, but we cannot escape the conclusion that the many parties here involved have, as a matter of law, arranged for future sales. The parties before us, and they are both numerous and

just short of unanimous, negotiated and agreed to the settlement terms; they urged us to approve the settlement; they supported it before the Court of Appeals; and they now argue to us in favor of our acceptance of the compensation portion of it. Some of these parties have agreed to forgo gas so that others may have it -- in return for compensation, or consideration, flowing to the former from the latter. The elements of a sale are present. Some tell us that no sales are involved because the transfers and compensation payments are involuntary, but we find this contention difficult to accept, because those who tell us so voluntarily support the settlement plan in all its aspects. They have agreed to the deprivations, and the augmentations, under the settlement terms. We think, thus, that sales are involved.

We conclude that the compensation plan is unacceptable as a matter of law. We also conclude that it is unacceptable as a matter of policy because of its inherent inequity. It punishes customers with high priority loads, for they would pay more for gas to meet those loads; it provides credits to those with lower priority loads, without regard to whether their costs or losses are correlated in any way with the payments to be received. The scheme is, in our view, patently unfair to Transco's customers and to their customers, and we are unwilling to approve it.

Finally, we find that compensation schemes such as the one herein proposed are not consistent with the public interest. A compensation scheme that is tied to the full cost of alternate fuels rather than fifty cents per Mcf could not be distinguished in principle from the plan here at issue. In either case, the price that the high priority natural gas consumer would be required to pay moves closer to a "commodity" level with each increase in curtailment. Also, the "compensation" that is received by the curtailed customers would cause upward pressure on alternate fuel prices. The beneficiaries of the added cost and upward pressure would be the producers of oil and other fuels and not the producers of natural gas. Such a system would exacerbate the existing distortion in the relative incentives for exploration for oil and for natural gas and, consequently, depress natural gas exploration at a time when national policy should encourage maximization of that exploration. If the ultimate consumer is to be required to pay a price for

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natural gas that moves toward the commodity level, sound policy and common sense dictate that the rewards flowing from that price be bestowed for the production of natural gas and not for the production of alternate fuels through "compensation" schemes such as that herein proposed.

Inasmuch as our position on the compensation scheme is explicitly subject to review by the Court of Appeals, and thus notwithstanding our views as to its unlawfulness, the compensation scheme shall remain in effect as provided by the Court of Appeals, pending its further order.

The Allocation Scheme

Since the compensation scheme is unlawful, the settlement must be rejected in toto, without regard to the propriety of the allocation scheme. 2/ Article X of the settlement provides:

> This agreement is made pursuant to Section 1.18(e) of the Commission's Rules of Practice and Procedure and, if it is not accepted in its entirety without condition, it shall be privileged and of no effect.

Thus, the currently effective allocation scheme shall continue in effect pursuant to the court's order, pending any future action by this Commission. In this regard, we are not prepared to say that the currently effective interim plan is sufficient to protect Transco's customers for even the remainder of the current winter heating season. Transco's supply situation continues to worsen, as indicated by the growing number

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2/ Of course, Transco is free to submit a new settlement, without the unlawful compensation feature, in which case we would accord a full review on the merits consistent with our responsibility under Michigan Consolidated Gas Company v. FPC, 283 F.2d 204 (D.C. Cir.), cert. denied 364 U.S. 913 (1960).

of petitions for extraordinary relief, 3/ and it may be necessary for the Commission to either modify the present interim plan or prescribe a new plan pursuant to our authority under section 5(a) of the Act.4/ Any further modification, however, will be made only if it is determined that the harm created by the currently effective plan is greater than the harm that would be inherent in a switch at mid-winter to a new plan.

The Staff Motion to Dismiss:

We shall also at this time deal with one further, recent development. On November 29, 1974, the Staff filed a motion asking us to dismiss six petitions for extraordinary relief that had been filed by certain of Transco's customers (in Dockets No. RP75-16-1, No. RP75-17-1, No. RP75-16-2, No. RP75-16-3, No. RP75-16-4, and No. RP75-16-5). The Staff argues that the settlement plan was represented to the Court of Appeals and accepted by it as one that would avoid irreparable harm; that the settlement agreement itself bars petitions for extraordinary relief in the absence of changed circumstances; and that the petitioners, in order to qualify for relief, must thus demonstrate a change in circumstances arising after November 21, 1974, on which date oral argument was heard by the Court of Appeals.

3/ We are consolidating for hearing the petitions for extraordinary relief from Transco's currently effective curtailment plan that have been filed in Dockets No. RP75-16-1, No. RP75-17-1, No. RP75-16-4, No. RP75-16-5, No. RP75-16-6, No. RP75-16-7 and No. RP75-16-8. The consolidation of these petitions for hearing and decision will facilitate our assessment of the effect upon Transco's other customers that would arise if such petitions were granted.

4/ The State of North Carolina and its Utilities Commission filed with us on January 7, 1975, a document entitled "Petition of State of North Carolina and North Carolina Utilities Commission for Investigation of Transco's Supply Situation, for Extraordinary Relief from Curtailment, and for Immediate Relief Pendente Lite". We construe this filing as constituting a complaint under section 5(a) of the Natural Gas Act, and we shall give further attention to it by separate order at an early date.

One of the foregoing petitions, that filed in Docket No. RP75-16-2, has been withdrawn. We approved the withdrawal in our order issued on December 19, 1974, but the petitioners therein have since renewed their request in a new docket, No. RP75-16-8. The petitioner in Docket No. RP75-16-3 filed for withdrawal on January 7. The remaining petitions have been the subject of recent orders, but all such petitions remain before us, either through applications for rehearing or through further requests for our action. We shall, therefore, deal with the Staff motion of November 29 with respect to the dockets involved, without thereby intending to affect any of them in any manner except in connection with the Staff motion.

As to these cases, we think that the Staff motion offers an appealing logic, but we fear that we would be working an injustice if we were to treat of these cases collectively. The parties to these cases stand on different footings. While the representations made by any of them to the Court of Appeals will certainly be relevant to our subsequent determination of their needs, those representations are not parallel. For example, among the petitioners here involved, at least two were not parties to the proceeding then before the Court of Appeals (the Stauffer Chemical Company and the Eastern Shore Natural Gas Company), and at least one other (the South Jersey Gas Company) says that it expressly advised the court that notwithstanding implementation of the settlement plan, it would still require extraordinary relief. In the circumstances, it will be necessary for us to deal with these cases, and the representations made by the parties to them, on a case-by-case basis, when the proceedings are completed and the cases reach us for decision.

In addition, we are disinclined to read the Court of Appeals' decision of November 26 as barring petitions for extraordinary relief filed earlier. While the court did observe that

> Opponents of both the present /pro rata/ plan and the 467 plan agree that the settlement will avoid irreparable harm (p. 20),

the court concluded its opinion by stating that

> Our order is not intended to restrict in any way the Commission's powers to respond to petitions for emergency or extraordinary relief from the curtailment plan placed in effect by this opinion. (p. 24)

Accordingly, we will not ourselves restrict our powers to respond to the petitions now in question, and we will deny the Staff motion.

Compliance with NEPA:

In the meantime, proceedings concerning a permanent curtailment plan for Transco move forward. The extensive record has been closed, and as noted, initial and reply briefs have been filed. Once again, however, we have before us the question of compliance with the National Environmental Policy Act. The Presiding Administrative Law Judge on November 15 certified to us the following question:

> In view of the actions of the Courts of Appeals for the Fifth and District of Columbia Circuits in Louisiana v. FPC and Consolidated Edison v. FPC, respectively, should the staff of the Commission be required to prepare an environmental impact statement?

In State of Louisiana v. F.P.C., No. 73-3478, the Court of Appeals for the Fifth Circuit on November 8, 1974, held that environmental impact statements are required in connection with permanent curtailment plans. Although the Court of Appeals for the District of Columbia has not announced a final decision on this point in the Consolidated Edison case, we are mindful of the views of the court recently expressed in American Smelting and Refining Company v. F.P.C., 494 F.2d 925 (D.C. Cir., 1974). Accordingly, this proceeding must be reopened so that compliance with the requirements of the National Environmental Policy Act can be achieved.

This action will necessarily delay for some months our decision on a permanent curtailment plan. We would admonish the parties to proceed with reasonable dispatch, so that we can act on a permanent plan at least before the 1975-76 heating season commences. In connection with the preparation of an environmental impact statement by the Staff, we would of course expect Transco and other parties to this proceeding to cooperate by responding to data requests from the Staff. We would also call to the attention of the parties certain of the caveats offered by the Fifth Circuit: "We do not intend the impact statement requirements to be a weapon for disappointed parties"; the NEPA obligation "is imposed subject to a rule of reason"; this Commission "should not pour an inordinate amount of its resources into environmental forecasting"; but we must "make a good faith effort to comply". That we will surely do. Our Staff will be required to prepare an environmental impact statement consistent with the court's opinion.

North Carolina Application for Rehearing:

Finally, the State of North Carolina and the North Carolina Utilities Commission applied for rehearing on December 2 in connection with our letter-order in this case of October 31. In that order we rejected the tariff sheets, intended to implement the September 30 settlement plan, that had been tendered by Transco on October 11. It is appropriate that rehearing be granted, but because Transco on November 27, 1974, again filed tariff sheets that implemented the settlement plan, which sheets we accepted in our order of December 31, 1974, no further action is required of us on this matter at this time.

The Commission finds:

(1) In light of the opinion of the Court of Appeals of the District of Columbia in Consolidated Edison v. F.P.C., the settlement plan filed by the Transcontinental Gas Pipe Line Corporation on September 30, 1974, is now in effect, as of November 16, 1974. Payments made pursuant to the compensation plan will be handled as ordered by the court.

(2) The interim curtailment plan filed by Transco on November 13, 1974, should be rejected.

(3) The motion filed by the Staff Counsel on November 29, 1974, in Docket Nos. RP75-16-1, RP75-17-1, RP75-16-3, RP75-16-4, and RP75-16-5, should be denied.

(4) The issue of a permanent curtailment plan for Transco should be the subject of an environmental impact statement and, if any party desires cross-examination thereon, of reopened hearings before the Presiding Administrative Law Judge, so that the requirements of the National Environmental Policy Act, as construed in State of Louisiana v. F.P.C., can be met.

(5) The application for rehearing, filed on December 2, 1974, by the State of North Carolina and the North Carolina Utilities Commission, should be granted.

(6) The assignments of error and grounds for rehearing set forth in all other applications for rehearing filed in this proceeding, insofar as they relate to the legality of the compensation scheme contained in the interim settlement plan, present no facts of legal principles that would warrant any change in or modification of the conclusion on such question contained in the order of November 12, 1974.

The Commission orders:

(A) The interim settlement plan filed by the Transcontinental Gas Pipe Line Corporation on September 30, 1974, shall be effective as of November 16, 1974, except that payments made pursuant to the compensation plan shall be handled as ordered by the court, pending further order of the court.

(B) The interim curtailment plan filed by Transco on November 13, 1974, is rejected.

(C) The proceeding, insofar as it relates to a permanent curtailment plan for Transco, is reopened so that all steps necessary may be taken to insure compliance with the National Environmental Policy Act, as construed in State of Louisiana v. F.P.C.. The Final Environmental Impact Statement prepared by the Staff shall be made a part of the record, and if any party desires to conduct cross-examination thereon, an opportunity will be afforded. In that event, a further public hearing with respect to the Final Environmental Impact Statement shall be held before the Presiding Administrative Law Judge in Washington, D.C., commencing on such date as he may, in his discretion prescribe.

(D) The application for rehearing, filed on December 2, 1974, by the State of North Carolina and the North Carolina Utilities Commission, is granted, as provided above.

(E) The Staff Motion filed on November 29, 1974, with respect to Docket Nos. RP75-16-1, RP75-17-1, RP75-16-3, RP75-16-4, and RP75-16-5 is denied.

(F) The applications for rehearing of the order of November 12, 1974, insofar as they relate to the legality of the compensation scheme contained in the interim settlement plan, are denied.

By the Commission. Commissioner Brooke, concurring and dissenting in part, filed a separate statement appended hereto.

(SEAL)

Kenneth F. Plumb,
Secretary.

Transcontinental Gas Pipe Line) Docket No. RP72-99
Corporation

(Issued January 10, 1975)

BROOKE, Commissioner, concurring and dissenting in part:

I concur in that portion of the order which assigns an effective date of November 16, 1974, to the interim settlement plan; rejects the interim curtailment plan filed on November 13, 1974; denies Commission Staff motions to dismiss various extraordinary relief cases; directs preparation of an environmental impact statement, and grants North Carolina's application for rehearing.

My dissent is limited solely to the determination that the compensation procedure agreed to in settlement is unacceptable both as a matter of law and of policy. The Commission now abandons the argument that the compensation plan would circumvent Section 4(d) of the Natural Gas Act as it applies to Transco, a conclusion with which I agree, but holds that the transfer or relinquishment of gas pursuant to the settlement plan would be a violation of both Sections 4 and 7(c) by Transco's customers, unless sales certificates were otherwise obtained and appropriate rate filings made, a conclusion with which I disagree.

My opinion as to the lawfulness or appropriateness of such compensation features is set forth in my dissent to the order denying the interim settlement proposal (Transcontinental Gas Pipe Line Corporation, Docket No. RP72-99, order issued November 12, 1974).

There is no dispute as to the facts, but the Commission followed a strange path in reaching its legal conclusion. Rather than affording the parties opportunity to brief the legal question of compensation prior to making a determination, the Commission abruptly surfaced its objections to the compensation procedure in its November 12 order. It now, in effect, regards the "extensive arguments by the parties" (Page 6, supra) as briefs on the legal issue and proceeds to reaffirm its prejudgment.

The interim settlement agreement represented a significant accomplishment among numerous Transco customers with diverse loads to allocate a dwindling pipeline gas supply on a split

pro-rata, end-use schedule to protect essential and necessary loads. It was absolutely clear among all participants that some customers would be called on to surrender gas to other customers -- and that the compensation plan for gas not received was simply an adjustment or offset to any economic dislocation occasioned by the allocation of volumes to protect high priority consumers. The Commission's strict adherence to cost-based rates is misplaced because the courts have bestowed considerable discretion upon the Commission in prescribing rates, dating back to the Hcpe case (FPC vs. Hope Natural Gas Company, 320 U.S. 591 (1944)) with its end result prescription, down to the Moss case (John E. Moss et al v. Federal Power Commission, No. 72-1837 et al, D.C. Circuit decided August 15, 1974), which held that market prices while not determinative, could be considered in setting just and reasonable rates.

The Commission's sudden concern over cost-based rates and the need for Sections 4 and 7 filings in emergency cases is rather curious. Certainly, it had no difficulty in formulating Section 2.68, Rules of Practice and Procedure, which provides that exempt entities (distributors and intrastate pipelines) can make temporary 60-day emergency sales and deliveries in interstate commerce "without any express authorization by the Federal Power Commission." The emergency nature of these sales also prompted a Commission conclusion that the "transporter should, of course, receive adequate compensation for any additional transportation services rendered" pursuant to Section 2.68. It further provides that upon termination of the emergency, the pipeline "shall inform the Commission, in writing, of the total amount of compensation received, if any, and the means by which the per Mcf compensation was derived." Since the compensation procedure is analogous to Section 2.68, the Commission's concern that the higher rates paid for exempt gas "are unrelated to a pipeline's cost of service plus reasonable rate of return" (Page 6) is misplaced.

It overlooks the fact that the transaction is between non-jurisdictional entities, that the pipeline is only the middleman transporter, and that the Commission would have legal review of the pipeline rates in an appropriate rate case. Section 2.68 also provides for extensions beyond 60 days. Exemption of temporary acts and operations is also extended under Section 157.22, Regulations Under the Natural Gas Act, which states that the "public interest does not require the issuance of a certificate for the...sale of natural gas necessary to assure maintenance of adequate natural gas

service where interruption or serious curtailment of service exists or is threatened..." Within 10 days, the Commission is to be advised of, inter alia, the rate schedule, contract or service agreement covering the sale involved. Similarly, Section 157.29 speaks of emergency 60-day sales by an independent producer without a Commission-issued certificate. Both Sections 157.22 and 157.29 contemplate the possibility of such 60-day emergency sales' becoming of longer duration. These three emergency programs, sanctioned by the Commission and never appealed to the courts, stand as ample justification for the type of compensation program proposed by Transco and its customers. They have been of critical importance in attracting badly needed increments of new gas to the interstate market, and similar programs to allocate gas, rather than attract new gas, should not be rejected out of hand.

I agree that the justice of the compensation plan most likely will be rough (Page 8, supra), but it is difficult to determine who will be "roughed up" the most. Certainly those high-priority customers called on to pay higher prices will feel the pinch, and assuredly those lower priority users who relinquish gas may find the surcharge only of moderate benefit to offset loss of gas supply -- but all parties, save one, agreed that such drastic steps were required to cushion gas and revenue loss at one end with gas gains and higher prices at the other. It is still significant that the settlement is strongly supported by many Transco customers who would be in far better shape under a straight 467-B end-use plan.

I cannot agree that Transco's compensation plan would punish high priority customers because they would pay more for receipt of additional gas and be unfair to those low priority users surrendering gas where little correlation exists between costs and losses with credits received. Nor can I agree that the surcharge plan is inconsistent with the public interest. The order states (Page 10) that the higher price occasioned by each increase in curtailment moves the market price closer to the "commodity" level.

I hope that my Colleagues are not overlooking the fact that one of the legacies of wellhead regulation of natural gas prices has been the creation of distorted patterns of fuels consumption in the United States -- that regulated low rates aided and abetted grossly inefficient uses, discouraged development of the gas resource potential, dispersed drilling technology to the foreign areas, and, as we are now experiencing, inherited the declining productivity of old wells, curtailments and higher consumer prices.

The massive natural gas reserves existing a quarter of a century ago were moved into the interstate system with little regard to their ultimate impact on the nation's basic energy sources of coal and oil. Rates were designed to supplant coal and oil in their traditional markets, and the efficiencies of high load factors were promoted to provide cheaper gas to the high-priority residential and commercial customers, even if it meant dumping off-peak gas under boilers at dime store rates to keep the lines full. Little thought was given to pricing gas on a value basis or whether it was the best fuel for the job, but I will not fault the past through hindsight. The critical energy crunch dictates that we conserve and make better use of our resources -- gas, oil and coal -- on the one hand while striving to develop our total resource base on the other.

It is probably true that those curtailed customers will exert pressure on alternate fuels, but I do not necessarily regard this as an evil. Price can be a very useful device in achieving a better allocation of fuel resources. It is very likely that we would have attained a far better pattern of energy consumption in this country had natural gas been permitted to establish a more realistic price, in relation to other fuels, through market forces. It is also very likely that consumer prices would be higher, whether or not a "commodity" rate, but this rate impact would have been accomplished gradually over a long period of time with a commensurate guarantee of more reliable supplies.

The search for gas is basically a search for hydrocarbons, with the search, if successful, yielding either gas or oil or both. I do not see it likely that natural gas exploration will be depressed as the result of a Transco-type compensation plan, although I will not quibble with the Commission's view that such is a possibility. The Commission's Bureau of Natural Gas issued on January 2, 1975, a staff report which concluded that "from here on we must make do with less gas in absolute terms" -- that it is no longer a question of supply playing catch-up with requirements. Making do with less gas is precisely what the settlement parties agreed to with the compensation feature serving to balance the equities.

The Commission has frequently commented on the desirable influence of marketplace competition and other market factors in determining appropriate natural gas rate levels. Now, it appears that one of the most important market factors, that of "commodity" pricing in relation to competitive fuels, is herein surfaced by the Commission as part of its rationale to negate the compensation procedure. Assuming such a position

in this case on "commodity" rates could well be regarded as Commission precedent to prohibit the factor's consideration in future rate determinations.

Albert B. Brooke, Jr.
Commissioner

APPENDIX G

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: John N. Nassikas, Chairman
William L. Springer and
Don S. Smith.

Transcontinental Gas Pipe Line Corporation	Docket Nos. RP72–99 and RP75–51

ORDER DIRECTING THE SECRETARY TO ISSUE A *SUBPOENA DUCES TECUM* FOR THE PRODUCTION OF CERTAIN BOOKS AND RECORDS

(Issued August 8, 1975)

The proceeding in Docket No. RP72–99 involves the determination of a permanent curtailment plan to be invoked on the system of Transcontinental Gas Pipe Line Corporation (Transco). Certain determinations made in that proceeding have been appealed in the Court. *Transcontinental Gas Pipe Line Corporation* v. *F.P.C.*, CADC No. 74–2036. On August 1, 1975, the Court issued an order to this Commission directing it, *inter alia*, (*Transco, ibid.*):

> Now, therefore this Court will hold in abeyance any decision upon the order of the Federal Power Commission concerning Transco's plan for allocating the allegedly scarce gas supply until the Commission has completed its own investigation and report to this Court of Transco's claims of reduced reserves by immediate subpoena of Transco's books and records pertaining to all gas supplies in which it has any legal interest, whether by ownership, lease, contract, or other means and by field investigation has determined the extent of the reduced reserves and the bona fides of Transco and its suppliers in meeting their past and future contract commitments;

We have instructed our Solicitor to seek rehearing *en banc* of the Court's order. However, pending that review, we direct the Secretary to issue a subpoena in compliance with the Court's order and instruct the Staff assigned to the investigation in Docket No. RP75–51 to conduct a "field investigation" to determine "the extent of the reduced reserves and the bona fides of Transco and its supplies [*sic,* suppliers] in meeting their past and future contract commitments." Our action in complying with the Court's order is an endeavor to not delay the initiation of the investigation ordered by the Court in the event that our petition for rehearing is denied. However, we feel constrained to note that even with the immediate compliance with the Court's order here initiated, in our judgment the investigation as detailed by the Court cannot be finished within the thirty day completion deadline set in the Court's order.

Since the proceeding in Docket No. RP 75–51 involves an investigation into the necessity for any curtailment on Transco's system, the material to be subpoenaed under the Court's order is also relevant to that ongoing investigation. We will, therefore, direct that the subpoena be issued in that docketed proceeding. However, such a joint issuance of a subpoena should not be construed as requiring in any manner or for any reason the consolidation of the proceedings in

Docket Nos. RP72–99 and RP75–51 and does not require Transco to make a duplicate filing.

The Commission finds:

In compliance with the Court's order, good cause exists to direct the Secretary of the Commission to issue a *subpoena duces tecum* as hereinafter ordered.

The Commission orders:

The Secretary of the Commission is hereby directed to immediately issue a *subpoena duces tecum* addressed to William J. Bowen, President and Chief Executive Officer of Transcontinental Gas Pipe Line Corporation to produce or cause to be produced Transco's "books and records pertaining to all gas supplies in which it has any legal interest, whether by ownership, lease, contract, or other means," and to produce or cause to be produced those books and records in the office of the Secretary of the Commission, 825 North Capitol Street, N.E., Washington, D.C., 20426, on or before August 15, 1975.

By the Commission.

KENNETH F. PLUMB,
Secretary.

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